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Trial

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

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3 TIFFANY AND COMPANY, et al,

4 Plaintiffs,

5 v.

13 CV 1041 (LTS)

6 COSTCO WHOLESALE CORPORATION,

7 Defendant.

8 -----x

9 New York, N.Y.
10 September 21, 2016
9:00 a.m.

11 Before:

12 HON. LAURA TAYLOR SWAIN,

13 District Judge

14 APPEARANCES

15 BROWNE GEORGE ROSS LLP

Attorneys for Plaintiffs

16 JEFFREY A. MITCHELL, ESQ.

JUDITH R. COHEN, ESQ.

17 BRETT D. KATZ, ESQ.

18 HUGHES HUBBARD

Attorneys for Defendant

19 JAMES W. DABNEY, ESQ.

RICHARD M. KOEHL, ESQ.

20 EMMA L. BARATTA, ESQ.

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1 (Trial resumed)

2 (In open court; jury not present)

3 THE DEPUTY CLERK: Tiffany and Company et al versus
4 Costco Wholesale Corporation.

5 THE COURT: Good morning, Mr. Mitchell, Ms. Cohen,
6 Ms. Abrams. Good morning to the plaintiff's team. Good
7 morning to Mr. Dabney, Ms. Baratta, counsel for the defense and
8 Mr. Schutt. So were the revised witness lists provided as
9 ordered last night?

10 MR. DABNEY: Yes, they were.

11 THE COURT: Very good. Do you have copies for the
12 Court?

13 MR. DABNEY: We should. I have the exhibit list. We
14 could get your Honor the witness list.

15 THE COURT: All right, the exhibit list is very
16 helpful for now. And we'll deal with the other. Thank you.
17 So is that one more?

18 MR. DABNEY: One more. Do you need a third one?

19 THE COURT: Ms. Ng and I each.

20 MR. DABNEY: Very good.

21 THE COURT: Thank you. All right. Mr. Mitchell,
22 would you update your projected witness sequence?

23 MR. MITCHELL: Yes, your Honor. After Ms. Abrams we
24 have Mr. Kaczmarek, Mr. Schutt, Mr. Hesketh and we have the
25 deposition testimony of, I don't remember the order of it, but

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1 Ms. Switzer, Mr. Jelenik and Ms. Murphy and we conclude with
2 Mr. Hart.

3 THE COURT: Thank you. And just as a reminder, and
4 I'll remind everybody at the end of the day, that tomorrow we
5 have the early end time at 2:00 with the 30-minute lunch break.

6 So, Mr. Mitchell, you have some additional issues?

7 MR. MITCHELL: Apparently. I didn't know I did, but
8 apparently I do.

9 THE COURT: Let's wait on those for a minute because I
10 have just one other thing on my list which is in anticipation
11 of the charge conference on Monday, which as you know it's
12 scheduled for 4:30 on Monday. Any briefs for alternate or
13 supplemental proposed language on substantive or other nature
14 issue must be filed with a courtesy copy to chambers by noon on
15 Friday so that everyone has an opportunity to consider what's
16 proffered. And objections with respect to issues that have
17 already been briefed are preserved and so I don't expect to
18 have to revisit old ground.

19 Mr. Mitchell?

20 MR. MITCHELL: First of all, as your Honor may recall,
21 Mr. Dabney raised an objection yesterday to the use of the
22 chart that was in Mr. Kaczmarek's declaration from June of
23 2014, and we discussed in detail with the Court that we were
24 going to change that document, which we did. His concern or
25 his expressed concern yesterday was use of the word "display,"

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1 as you may recall in those charts.

2 THE COURT: Yes.

3 MR. MITCHELL: So we removed that and at 7:37 last
4 evening e-mailed Mr. Dabney the copy of the revised chart. Ten
5 minutes before your Honor walked into the courtroom Mr. Dabney
6 says he still doesn't like the language and now he's handed me
7 a further markup. We had given him this at 7:37 last night.
8 We had modified it based upon the conversation and the order
9 the Court entered yesterday, we'd like to proceed upon the
10 modified document that was served on him last night at 7:37. I
11 said, "Is there any reason you couldn't have e-mailed me last
12 night if you had a problem with this? Because we gave it to
13 you early enough to do that." There was no response.

14 THE COURT: Mr. Dabney, do you want to be heard?

15 MR. DABNEY: Yes, your Honor. And let me say, first
16 of all, before saying anything else that as your Honor knows, I
17 am fairly passionate about my approach to practice and I do
18 what I can to preserve my client's rights and anything I've
19 said or done that has been treated as disrespectful by the
20 Court or your Honor --

21 THE COURT: Well, they have been. This sort of
22 non-apology, "if anybody is offended I'm sorry," does not go
23 far. You are operating in a profession that has rules in which
24 judges make directions and in which a level of civility and
25 basic propriety in human interaction is required as between

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1 lawyers and as between lawyers and the Court, and, yes, you
2 have an obligation of zealous advocacy, but it's zealous
3 advocacy within the bounds of the law. I'm not saying you
4 overstepped any specific legal boundaries here, but aggressive
5 tactics burn a lot of human capital, burn personal capital, I
6 assume you're making strategic decisions and yesterday I told
7 you your strategic decisions are ones that may be digging holes
8 in your road and I presume you're going to be taking that into
9 account in making your decisions.

10 MR. DABNEY: Your Honor, I just want to make clear
11 that I hold this institution and your Honor in the highest
12 respect and I regret that if anything I've done or said as
13 seeming to signal otherwise, and if I have not been -- anyway,
14 I say that, because the way this has been approached is that
15 this application is very personal as to me, why didn't I do
16 something when I was exhausted last night getting ready to
17 cross-examine witnesses today.

18 I look at this document which over objection was not
19 in the expert report. Before coming out here I told counsel
20 for the plaintiff how if they modified it it would be
21 acceptable to Costco. I can put up on the ELMO the
22 modifications we proposed, because I believe that the
23 modifications that were attempted by the other side were not
24 consistent with the colloquy yesterday.

25 This is, again, a document that was never subject to

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1 the pretrial expert exchange or discovery process and the
2 apparent purpose of this document is to create an inference
3 that Costco sales records are not true because there are so
4 many more sign records than there are sales records. And the
5 problem we have with the headers on this, which no witness has
6 sponsored, no witness with personal knowledge as to this, we
7 don't know who created this document, implies that what is
8 shown here are signs and signs in use and the use of the word
9 "use" in this context is ambiguous.

10 So what we have said is simply use language that
11 removes any insinuation that what we're looking at here is
12 anything other than printouts of selected records in Costco's
13 AS/400 computer records, and if they do that and do not by
14 their headings imply that these were signs in stores, we have
15 no problem with the use of the document in that fashion. And I
16 wrote it out so as to try to provide counsel with something
17 they could use and not to be obstructive. So that was my
18 attempt at instruction.

19 THE COURT: Thank you for that information. I
20 understand it was delivered this morning and as you know I have
21 not given counsel permission to bring printers and such into
22 the courthouse in order to regenerate documents on the spot.
23 The exhibit refers to signage records. To the extent you feel
24 anything is misleading or needs to be clarified you'll have the
25 opportunity to do that on cross. So to the extent this is an

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1 objection to this exhibit on the grounds that are outlined in
2 the exemplar that you've put on the ELMO, that objection is
3 overruled, and if you want to mark that in some way for the
4 record you can call it.

5 MR. DABNEY: We'll call it, this is a page Plaintiff's
6 Exhibit 133.0001 and I'll just mark this with --

7 THE COURT: Costco objections 9/21 or whatever the
8 date is, 2016.

9 MR. DABNEY: That's fine, your Honor.

10 THE COURT: Thank you.

11 MR. DABNEY: We have another related, closely related
12 issue to bring up before your Honor and that is, and again,
13 this is something we hadn't exchanged before trial in which the
14 parties exchanged demonstratives and one of the plaintiff's
15 demonstratives on damages had included numbers and a theory
16 that we had objected to and we had thought they had withdrawn
17 that, but then in opening counsel for the plaintiff said that
18 their expert, I'm going to put up page 58 of the transcript,
19 that their expert was going to testify as stated on page 58,
20 lines 14 through page 58, line 19, and here again this figure,
21 3,349 rings and 13.9 million of revenues is not only not in
22 Mr. Kaczmarek's original report, it is not only not in his
23 untimely summary judgment opposition, but it's also directly
24 contrary to what he submitted in his summary judgment
25 opposition, and we under -- I'll put up what Mr. Kaczmarek did

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1 in the summary judgment opposition which is the same place that
2 this chart came from. This was handed up to the Court
3 yesterday.

4 The history here is that in Mr. Kaczmarek's original
5 expert report he relied on the summary document 37754. Then
6 Dr. Cornell rebutted that and pointed out that 37754 included
7 some sales from before the statute of limitations and some
8 sales from after the signs were changed. And so Mr. Kaczmarek
9 in his affidavit in June said okay, well, I can easily adjust
10 to that and he provided tables on page 13 of his expert report,
11 and I'll put up page 13 of his report on the document camera.
12 And what Mr. Kaczmarek said was okay, I originally said there
13 were 2,688 net sales on the spreadsheet and if that includes
14 things that shouldn't be included, I'll reduce it to the
15 2,000 -- well, he's using a different number here.

16 MR. MITCHELL: It's the bottom of the page.

17 MR. DABNEY: Okay, sorry, the bottom of the page. So
18 we have the number 2,498 which was the net sales figure that
19 Dr. Cornell had relied on for all of the signs including
20 Tiffany set and Tiffany setting, round Tiffany set and so
21 forth. Never did Mr. Kaczmarek suggest that the concept of
22 gross profits in this case should be based on Costco's gross
23 sales revenues rather than Costco's net sales revenues based on
24 the unit items. The numbers in this case was always, if you
25 took -- if you didn't factor out signs that included setting

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1 and set, the number was always about 2,498. So for us to hear
2 two weeks before trial that their expert is proposing now to
3 say that the basis is not 2,498 and the sales figures here but
4 is 3,349, which is no figure that he ever suggested was a fair
5 measure of the profits here, we think is barred by Rule 37 and
6 should not be permitted.

7 Where this number comes from, apparently, if you look
8 at what counsel said during opening statement, is that after
9 Dr. Cornell's report was served and even after Mr. Kaczmarek
10 made his amendments we were just looking at sometime in 2015,
11 2016, we don't know when, someone thought to put forward yet
12 another theory of damages based on the intermediate calculation
13 by Dr. Cornell of what the gross unit sales were before you
14 took into account return. But in a case in which gross profits
15 is the measure of damages, both experts agree that the correct
16 number was the net sales number, not the gross sales number on
17 returns. So we don't believe it is appropriate for
18 Mr. Kaczmarek to give evidence on this theory which was never
19 disclosed even in his own timely summary judgment.

20 THE COURT: Thank you, Mr. Mitchell?

21 MR. MITCHELL: I'm always befuddled by some of these
22 objections. We had an expert report prepared by Mr. Kaczmarek
23 in the fall of 2013, November. He had to prepare his report
24 first. He was provided with documentation, obviously long
25 before your Honor ruled in the case or where the scope of the

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1 case had been narrowed in September of 2015 by the Court's
2 decision on the summary judgment motion. Subsequent to the
3 submission of his report Mr. Cornell submitted a counter
4 report. Mr. Cornell said, Mr. Kaczmarek, you were wrong, you
5 included sales outside the statute of limitations period.
6 Mr. Kaczmarek didn't know at the time he did it because he
7 assumed, he will testify, that when he received whatever
8 production Costco had made he assumed they produced relevant
9 sales information and he did not assume that whatever sales
10 information they produced was not sales information that he
11 should try to calculate profit on.

12 But what happened is, he is not disputing what
13 Costco's expert says. Fine, it's outside the statute of
14 limitations. If you look at what Mr. Dabney put up, the
15 difference is about \$100,000, so he gave up on the point and
16 simply is adopting their calculation and using their
17 calculation with his profit figure of 13 percent which will
18 establish -- so we don't have to fight over it. I don't even
19 understand --

20 THE COURT: I think what I'm hearing Mr. Dabney say is
21 that his representation and understanding is that the experts
22 both at the end of the day calculated the damages figure based
23 on net sales of rings, rings after returns, which is that 2498
24 or thereabouts figure and he's hearing and reading you to have
25 said yesterday, no, our expert is now going to be proffering as

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1 a basis for the damages calculation the number of sales prior
2 to returns, the 3349 figure and running that same 13 percent
3 margin or whatever on the 3349, although those rings were
4 returned and no expert report from the plaintiff had ever put
5 forward that theory or the analytical basis of it. Did I hear
6 you correctly, Mr. Dabney?

7 MR. DABNEY: Yes, your Honor.

8 THE COURT: So are you planning to present 3349 as a
9 base figure for the profit calculation and if so, on what
10 disclosure and on what analytical basis?

11 MR. MITCHELL: I wish I had a conversation with Mr.
12 Dabney about this before we came to court today, but, again,
13 this is another instance of us talking about it for the first
14 time, hearing it from him. One of the rulings your Honor made
15 previously, and I don't know how the evidence is going to come
16 out, I think I know how it's going to come out, but we need to
17 show gross sales. It's up to them to show returns and they
18 presumably had deducted from those gross sales returns of
19 subject rings. I don't believe their records support that
20 deduction. So what Mr. Kaczmarek will do is he'll say if you
21 go with gross sales, because returns are on Costco to prove, I
22 don't believe their records support a sign-by-sign matching --
23 Mr. Kaczmarek is going to talk about the state of the records
24 that he received, but I don't believe that their proof will
25 support the deductions.

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1 The jury can disagree with that or agree with that.
2 The difference in the scheme of things is not that great. I
3 think the difference is the difference between 1.4 million and
4 1.8 million, and I'm sure that 400,000 is going to be spent by
5 Costco in legal fees fighting over the 400,000. But since we
6 only have to prove gross sales, that gross sales figure is
7 Dr. Cornell's gross sales figure and then he deducts from that
8 gross sales figure. That's the point. It's simply using your
9 number, if the number is 3,000 and the returns aren't credited
10 properly, which is your burden, then it's 3,000.

11 THE COURT: So it's an issue of how you get to a net
12 number and the burden shifting in this particular context of
13 gross profit calculations.

14 MR. MITCHELL: Absolutely correct and it's simply
15 using their numbers.

16 THE COURT: Thank you.

17 MR. DABNEY: Your Honor, the document Mr. Kaczmarek
18 relied on included gross units as well as gross dollars. It
19 included net units as well as net dollars and the expert report
20 that they served in November shows not the gross units and
21 gross dollars but the net units and net dollars. That is what
22 Dr. Cornell responded to. That is the position Mr. Kaczmarek
23 took as recently as June, 2014, and there never was a word said
24 in this trial in prior proceedings that instead of looking at
25 sales net of returns as setting the top line revenue number in

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1 this case from which costs of goods sold would be deducted that
2 Mr. Kaczmarek was going to come in and argue that in order to
3 figure out what Costco's profits were he was going to talk
4 about what the sales were on an intermediate number of the
5 rebuttal expert report that he obviously did not rely on even
6 when in June of 2014 he had the chance to change his report,
7 apparently, and he didn't do it even then.

8 So we just think that under Rule 37 and under Rule 26,
9 it is clearly not proper for the plaintiff to come in and try
10 to inflate the claim in the way that they're doing. This is
11 not about who has the burden of proof in proving deductions
12 from revenues. This has to do with what both experts said were
13 the revenues. And this is a totally new issue being injected
14 into the case, the returns of items that are shown on the
15 records they relied on and put this out as the gross profits.
16 It wasn't -- this is a totally new concept that gross profits
17 should not take as the starting point the revenue from the
18 items according to records of gross net of returns. So we
19 don't think this should be allowed to be used.

20 THE COURT: The objection is overruled and your record
21 is made. We will bring in the jury.

22 MR. MITCHELL: One final item that had to do
23 apparently with the testimony of Mr. Schutt. It may or may not
24 be an issue but I want to raise it so I don't have to be
25 interrupted if I don't have to be. I have a question for Mr.

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1 Schutt about Costco's counterclaim. It's a general question.
2 I don't need to put the pleading into the record, but I might
3 need to read a paragraph from the pleading if the witness,
4 depending on what the witness's response is. Assuming that's
5 okay, I don't need to put the pleading in. Mr. Dabney's
6 objection was to putting the pleading in. I said I don't need
7 to do that, and I wasn't clear, again, whether he's objecting
8 to me just asking him a question regarding the statement in the
9 counterclaim.

10 THE COURT: Mr. Dabney?

11 MR. DABNEY: Your Honor, before trial we had objected
12 to the plaintiff's exhibit list which had included the
13 complaint, the answer and counterclaim, the prior counterclaim
14 and the application for interlocutory appeal to the Second
15 Circuit. We don't believe that these lawyer-signed pleadings
16 should be introduced into evidence or relied upon to
17 cross-examine a lay witness about the issues in this case which
18 is what was the state of mind and why did certain signs happen
19 prior to the lawsuit being filed. By the time the pleading was
20 filed the signs had all been changed. So we just think --

21 THE COURT: Well, there is a claim and there's
22 argumentation that goes to the likelihood of recurrence of the
23 conduct and Costco's attitude going forward to Tiffany's
24 trademarks and that goes into the question of whether punitive
25 damages are necessary as determinable. If there's a request

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1 for injunctive relief that the Court will evaluate on the basis
2 of this record, it will be relevant to that. So that's what I
3 understand the basis of that particular proffer being.

4 So, Mr. Mitchell has said he's not going to try to put
5 these pleadings themselves before, but instead will ask a
6 question designed to establish that Costco's response was
7 "invalidate the trademark" as opposed to "sorry." So, do you
8 have an objection to that question and those circumstances with
9 the possibility that he might offer the document to refresh
10 recollection but not get into --

11 MR. DABNEY: I don't know if it's going to be a
12 practical problem, but we'll object to that under Rule 403.

13 THE COURT: That objection is overruled.

14 MR. DABNEY: Your Honor, Mr. Mitchell said I have one
15 thing and I neglected to mention and I needed to yesterday.
16 When I was talking about what Mr. Palmieri would testify to,
17 one of the subjects that he was examined about in his
18 deposition and that he's going to potentially testify to is the
19 testimony the plaintiffs apparently may offer with regard to
20 appraisals of Costco diamond rings. So in addition to
21 rebutting the testimony they want to proffer about jewelry
22 shapes, Mr. Palmieri is also potentially going to rebut the
23 evidence they've offered about appraisals.

24 MR. MITCHELL: Your Honor, the issue of appraisals was
25 obviously before the Court in the motions in limine. We had

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1 proffered Cecilia Gardner, the head of the Jewelers Vigilance
2 Committee, as your Honor may remember, who was going to talk
3 about standards.

4 THE COURT: Yes.

5 MR. MITCHELL: The Court granted that motion in limine
6 so she is not going to testify at trial. Mr. Palmieri is a
7 member of the Jewelers Vigilance Committee and he wrote the
8 very standards about which Ms. Gardner was going to testify.
9 So having used the shield of a motion in limine to prevent
10 Ms. Gardner from testifying, then he can't use Mr. Palmieri I
11 don't think as a sword to now testify about standards when
12 Ms. Gardner is not going to testify. That was an issue that
13 was a discrete issue that was raised at Mr. Palmieri's
14 deposition and that's why we got Ms. Gardner, that's why we
15 obtained Ms. Gardner's testimony, because what Mr. Palmieri
16 said was wrong. And I can't impeach him now without
17 Ms. Gardner. That's what they wanted. They didn't want
18 Ms. Gardner here.

19 We're simply putting before the jury the appraisal.
20 We bought the ring and got an appraisal and whatever that
21 appraisal is or whatever that appraisal is supposed to be, we
22 have one too, we bought a Costco ring. So they wanted it to go
23 that way and they didn't want to talk about standards of
24 appraisals. That's fine. It's just before the jury as a fact,
25 but at this time to say now I'm going to bring Mr. Palmieri in

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1 to talk about exactly what we prevented Ms. Gardner from
2 testify to this.

3 MR. DABNEY: Your Honor, we had taken the position
4 this argument about appraisals shouldn't be taking place in
5 this case at all. Your Honor overruled our position on that,
6 so notwithstanding the granting of the motion in limine to keep
7 out this third party's organization non-binding standards, the
8 Court has ruled that the plaintiffs may come in and make
9 arguments that the appraisal like we went over yesterday is
10 somehow relevant to issues in the case.

11 So I don't know how their case is going to unfold, but
12 just the potential subject matter of Mr. Palmieri's testimony,
13 not about standards, but about what evidence they're going to
14 put in on the subject, whatever that might be, it might include
15 that. That's the only point.

16 THE COURT: Well, I think we will need to see how this
17 develops, but I will put you all on notice that to the extent
18 it develops and I permit Mr. Palmieri to testify as to
19 standards that raise the matter of appraisal or the propriety
20 of those standards I may permit the plaintiff to rebut with the
21 evidence as to the Jewelers Vigilance, whatever it is,
22 standards and Mr. Palmieri's familiarity with it and
23 familiarization with those standards.

24 MR. DABNEY: Very good.

25 THE COURT: Let's call this a two-minute warning. Do

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1 whatever you need to do, come back to your places and we'll
2 bring the jury in.

3 (Recess)

4 oOo

5 THE COURT: Good morning, again. Please be seated.
6 Before the jury is brought in I've been asked to clarify an
7 element of the timekeeping rules. So when a party is
8 questioning a witness, the entire time period of that
9 examination including sidebars is ordinarily charged to the
10 time of the person who is questioning. As I had told you
11 before, I reserve the right to determine that instead time
12 should be charged to one side or the other or in some other way
13 disproportionately, and I'll either make that determination on
14 the spot or shortly afterward and let you all know if that rule
15 is different.

16 So conferences and colloquies like this are
17 presumptively divided half and half unless I say otherwise.
18 The time that is taken for a direct or cross-examination is
19 charged to the person conducting, the party conducting the
20 examination, unless I say otherwise. All right. Thank you
21 all.

22 Ms. Ng, would you bring the jury in, please?
23 Ms. Abrams, would you please come back to your seat?

24 (Continued on next page)

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Abrams - cross

1 (In open court; jury present)

2 THE COURT: Members of the jury, thank you for your
3 patience while we sorted out some issues that will make the
4 presentation of evidence go for smoothly. So now we continue
5 with the cross-examination of Ms. Abrams. Ms. Abrams, you are
6 still under oath.

7 THE WITNESS: Yes.

8 EWA ABRAMS,

9 called as a witness by the Plaintiff,

10 having been previously duly sworn, testified as follows:

11 THE COURT: Mr. Dabney.

12 CROSS-EXAMINATION

13 BY MR. DABNEY: (Continued)

14 Q. Ms. Abrams, yesterday we talked a little bit about the
15 diamond ring that was purchased at Costco and we identified the
16 beige box, Plaintiff's Exhibit 19, which I believe you said was
17 similar to the box that your investigator got, correct?

18 A. Yes.

19 Q. And you were also asked about the Tiffany and Company blue
20 box package, do you recall that?

21 A. Yes.

22 MR. DABNEY: Your Honor, may I approach the witness
23 with a sample of packing?

24 THE COURT: Yes. Does it have a designation?

25 MR. DABNEY: This has been marked as Defendant's Trial

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Abrams - cross

1 Exhibit 821.

2 Q. I hand you a bag and box marked Defendant's Exhibit 821.

3 Can you identify that please?

4 A. This is Tiffany packaging blue box and blue bag. Typical
5 packaging.

6 MR. DABNEY: Your Honor we offer Exhibit 821 in
7 evidence.

8 THE COURT: Any objection?

9 MR. MITCHELL: Can I see what that is?

10 (Pause)

11 MR. MITCHELL: Can we have a sidebar, your Honor?

12 THE COURT: Yes.

13 (Continued on next page)

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Abrams - cross

1 (At the side bar)

2 MR. MITCHELL: This was not on their exhibit list and
3 now it's being offered as an exhibit. I don't know for what
4 purpose. Obviously this is a bag from a Tiffany store, not
5 Costco. I don't know what he intends to do with it, but it's
6 certainly not on the list. To the extent it's not on the list
7 it shouldn't be offered as evidence in the case. I don't know
8 what Mr. Dabney intends to do with it should it be used in the
9 future, but 821 is not an exhibit.

10 THE COURT: The list you gave me ends at 811, so
11 what's going on?

12 MR. DABNEY: This is a demonstrative exhibit. It was
13 provided to us by the plaintiffs throughout the case. We had
14 been relying on other Tiffany and Company packaging throughout
15 our proceedings. This is in fact a substitution for one of the
16 other exhibits on our list. We now have their witness for the
17 first time to authenticate the bag which she has, so there's no
18 denial that the plaintiff's produced this to us. This has been
19 in the case from the beginning and we're simply offering it so
20 that the jury can see the difference between the Costco
21 packaging and the Tiffany and Company packaging that the
22 investigator was sent to look for at the Costco store.

23 THE COURT: If you want to have a voir dire and have
24 the witness undo the ribbon and make sure that everything
25 inside is produced as Tiffany, then you can, but the

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Abrams - cross

1 representation is that's what they got from your side.

2 MR. MITCHELL: You say you have a photograph of this
3 as one of the other exhibits?

4 MR. DABNEY: You delivered at the end of the case --

5 MR. MITCHELL: It doesn't mean you put it on your
6 exhibit list.

7 THE COURT: All right, it's not on the exhibit list.
8 That's not going to be a ground that's going to get you the
9 objection.

10 MR. MITCHELL: I understand.

11 THE COURT: It's authenticity.

12 MR. MITCHELL: I'll withdraw the objection.

13 THE COURT: Thank you.

14 (Continued on next page)

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Abrams - cross

1 (In open court; jury present)

2 MR. DABNEY: Your Honor, may I show this to the jury?

3 THE COURT: Just a minute. We're back on the record
4 now and I have to complete the record. Defendant's Exhibit 821
5 is admitted into evidence. You may ask your questions.

6 (Defendant's Exhibit 821 received in evidence)

7 BY MR. DABNEY:

8 Q. Ms. Abrams, I believe you were in court yesterday for the
9 opening statements, correct?

10 A. Correct.

11 MR. DABNEY: With your Honor's permission, I'd like to
12 put up an excerpt from the opening a statement made by
13 plaintiff's counsel?

14 MR. MITCHELL: If we could just read it?

15 THE COURT: I don't understand why you need to put it
16 up.

17 Q. Ms. Abrams, do you recall your counsel telling the jury,
18 quote, "So how many rings did Costco sell? That's what Tiffany
19 really wanted to know. And the answer to that question has
20 remained very elusive."

21 Do you recall that statement being made?

22 A. I recall.

23 Q. Now, I'd like to put up on the document camera Plaintiff's
24 Exhibit 487, which was a letter that plaintiff sent to you
25 January 31, 2014, I believe you testified?

G9LFTIF1

Abrams - cross

1 A. Yes.

2 Q. So let's go to the first item listed here, item 639911 --

3 THE COURT: I'm sorry, could you remind me what
4 exhibit that is?

5 MR. DABNEY: This is Exhibit 487. Do we have extra
6 copies?

7 THE COURT: The witness has it.

8 A. I have it in the binder.

9 MR. DABNEY: You do have it. Does the Court have a
10 copy?

11 THE COURT: Yes.

12 Q. Now, Ms. Abrams, before the case was brought in response to
13 a request for information from your company, Costco provided
14 you the information in this first paragraph that said, not only
15 were there 224 net sales of this item in fiscal year 2012 and
16 139 in fiscal year 2013 to date, but it also told you that the
17 signage text had changed over time, didn't it?

18 A. Correct.

19 Q. And in this case one of the things that you were provided
20 with by Costco was sales records, isn't that so?

21 A. That's right.

22 Q. Ms. Abrams, with the Court's permission, I'd like to
23 approach the witness with a copy of Costco trial exhibit 52
24 which is in her binder but it's small.

25 THE COURT: Yes, you may.

G9LFTIF1

Abrams - cross

1 MR. DABNEY: I also have copies for the Court, just
2 larger so they can be read easier.

3 THE COURT: Thank you.

4 Q. Ms. Abrams, I show you what's been marked as Costco trial
5 exhibit 52. You have seen this exhibit before, have you not?

6 A. Yes.

7 Q. And you understand this to be a listing of sales, of items
8 to specific members that Costco made, do you not?

9 A. Yes.

10 Q. And this was provided to you in 2013, was it not?

11 A. I don't recall.

12 MR. DABNEY: Your Honor, we would offer Defendant's
13 Exhibit 52 in evidence.

14 THE COURT: Any objection?

15 MR. MITCHELL: No objection.

16 THE COURT: Defendant's Exhibit 52 is admitted in
17 evidence.

18 (Defendant's Exhibit 52 received in evidence)

19 Q. And so if we look, for example, at page, direct your
20 attention to -- the pages aren't numbered, unfortunately. But
21 let's just, if you could turn to the page where the item number
22 begins 639911 for the first time, which is about the middle of
23 the document.

24 MR. MITCHELL: Where are you?

25 MR. DABNEY: The pages on this copy aren't numbered.

G9LFTIF1

Abrams - cross

1 THE COURT: The first unit number on that page is
2 637277 and goes to 63991.

3 MR. DABNEY: Correct.

4 THE COURT: And it's a right side up as opposed to a
5 backward upside down page?

6 MR. DABNEY: I guess so.

7 THE COURT: Do you have it, Ms. Abrams?

8 THE WITNESS: I don't. Would you mind counting the
9 pages?

10 THE COURT: I can swap copies with Ms. Abrams.

11 MR. DABNEY: Sure.

12 THE WITNESS: Thank you.

13 MR. DABNEY: Do you have the page in front of you?
14 A. Yes, I believe so.

15 Q. And it's true, isn't it, that at your company's request
16 Costco provided you with records that not only showed the net
17 sales of these units but told you the names and addresses and
18 various information about the people who bought them?

19 A. Yes, of these particular units, yes.

20 Q. And if you wanted to count out the number of sales of these
21 items, 639911 in this document, was there anything that
22 prevented you from doing that?

23 A. No. You could count this unit in this document, yes.

24 Q. And did you ever compare how many sales are on the buyer
25 list, Costco Exhibit 52, to the number of net sales for that

G9LFTIF1

Abrams - cross

1 item for fiscal year 2012 that was given in the letter from
2 January 13?

3 A. I personally didn't, but I -- yes, we went through that
4 exercise likely.

5 Q. Did you provide this buyer list sales record to your expert
6 in this case, Mr. Kaczmarek?

7 A. I believe we did.

8 Q. And what's the basis of your belief?

9 A. Because we were asking him to provide a report on potential
10 damages. But I don't recall specifically, you know, the date.

11 Q. And are you saying that you have some question about the
12 contents of this buyer list, Ms. Abrams?

13 A. No, but this is an independent buyer list. It's not
14 necessarily to any particular signs that were in the store at
15 any given time.

16 MR. DABNEY: Your Honor, I believe that question
17 called for a yes or no.

18 THE COURT: The motion to strike is denied.

19 Q. Ms. Abrams, this document tells you exactly what the unit
20 sales were according to Costco sales records, doesn't it?

21 A. I believe that's what it purports to show for these
22 particular units.

23 Q. Okay. So then, so what we have, then, is a listing of the
24 sales and then if we go back to the letter they also tell you
25 that the sign for the item 639911 changed sometime in

G9LFTIF1

Abrams - cross

1 approximately 2012. Do you see that?

2 A. Yes.

3 Q. And the letter says that before 2012 signs said Tiffany
4 setting or Tiffany set, didn't it?

5 A. That's what it says, yes.

6 Q. And you testified yesterday you understand that there's no
7 claim in this case for signs that said Tiffany setting or
8 Tiffany set, correct?

9 A. We did not bring a claim with respect to Tiffany setting.

10 Q. Now, you were shown Exhibits -- can I direct your attention
11 to Plaintiff's Trial Exhibit 25, which is in your book there.
12 Do you have it?

13 A. Got it.

14 Q. That's a 639911 sign that's in evidence?

15 A. Yes.

16 Q. So I'm going to put it up on the ELMO and I'm going to ask
17 you do you have any evidence that you're prepared to describe
18 here that a sign in this form was used by Costco prior to 2012?

19 A. I don't have the signage information in front of me so I
20 don't recall.

21 Q. So this case has been pending for three years. Is there
22 any evidence that you're aware of that that sign was used prior
23 to 2012 by Costco?

24 MR. MITCHELL: Objection.

25 THE COURT: Consult.

G9LFTIF1

Abrams - cross

1 (Pause)

2 Q. Ms. Abrams, you understand that one of the issues in the
3 case is how many items 639911 sales were made between certain
4 dates in time. Do you understand that?

5 A. Yes.

6 Q. And Defendant's Exhibit 52 is a document that you
7 understand to be a business record that would show the number
8 of sales for item 639911, correct?

9 A. Yes.

10 Q. And then a second issue we have to decide is what sales
11 coincided in time with signs like this. Do you understand
12 that's another issue we have to decide?

13 A. Sorry, can you repeat the question?

14 Q. Yes. Another issue we have to decide is what sales
15 coincided in time with signs that looked like this.

16 A. That signs that were in the store that looked like this,
17 and others using the Tiffany name.

18 Q. So with regard to this item in particular.

19 A. Yes.

20 Q. Sitting here today you don't have any basis for saying that
21 that sign was used anywhere prior to February of 2012, do you?

22 A. Like I said, I don't recall. There were thousands of
23 documents and pages produced in this case, so I don't recall
24 precisely.

25 Q. You don't have any evidence you can identify here?

G9LFTIF1

Abrams - cross

1 A. Again, thousands of pages of documents were produced in
2 this case. I do not recall precisely.

3 Q. Well, Ms. Abrams, you were told by Costco in January 2013
4 that the sign was changed in 2013 -- in 2012. I'm asking you
5 now do you have any basis for disputing that statement sitting
6 right here?

7 A. We were not produced the records back in 2013 when we
8 received the letter in January.

9 Q. I'm asking you when you want the truth to be found in this
10 case Ms. Abrams, you realized Costco told you more than three
11 years ago that this sign didn't exist prior to October 2012 and
12 was not in use prior to 2012. Are you disputing that in this
13 case?

14 A. Again, I don't recall what the response was prior to that
15 date and we had no documentary evidence from Costco as of
16 January 2013 concerning its representations in the letter.

17 Q. Are you --

18 THE COURT: Mr. Dabney, you've had several answers to
19 that question.

20 Q. Ms. Abrams, you were also told with regard to item 605880
21 that this item was first sold in approximately October 2011.
22 Are you disputing that statement?

23 A. Again, I don't recall whether or not further in the case
24 documents were produced to corroborate that.

25 Q. I don't want you to ever be able to say you weren't given a

G9LFTIF1

Abrams - cross

1 chance to tell us if you have some evidence you want the jury
2 to consider that a sign without "setting" or "set" for item
3 605880 was used prior to September or October 2011. Do you
4 have any evidence you care to identify here today?

5 A. We weren't produced any evidence in connection with this
6 letter. Again, I don't remember of the thousands and thousands
7 of pages produced.

8 (Continued next page)

G9LATIF2ps

Abrams - redirect

1 MR. DABNEY: I'll put up the -- I have nothing
2 further, your Honor.

3 THE COURT: Thank you. Is there any redirect?

4 MR. MITCHELL: Yes, your Honor. Thank you.

5 REDIRECT EXAMINATION

6 BY MR. MITCHELL:

7 Q. Ms. Abrams, first, I just want to be clear on the record,
8 you have not spoken to me or anyone else about your testimony
9 since court yesterday, correct?

10 A. No, no one.

11 Q. "No" meaning you have not, right?

12 A. I have not.

13 Q. And I instructed you that you were not to speak with anyone
14 about your testimony because you were still on
15 cross-examination, correct?

16 A. Correct.

17 Q. And you and I have not spoken since you stepped down from
18 the witness stand yesterday, right?

19 A. Correct.

20 Q. And you have not talked to anyone else about your
21 testimony; is that right?

22 A. Correct, I have not.

23 Q. So let me start with the following. I'm sure you will
24 recall Mr. Dabney's aggressive questioning yesterday about your
25 testimony concerning the \$4,480 sales price reflected in

G9LATIF2ps

Abrams - redirect

1 Plaintiff's Exhibit 82. Do you remember that?

2 A. Yes, I do.

3 Q. Mr. Dabney asked you why you did not mention the date of
4 each of those sales. Do you remember those questions?

5 A. Yes.

6 Q. Were you answering my questions that I put to you during
7 your examination?

8 A. Yes.

9 Q. And it is true, isn't it, that I didn't ask you any
10 questions about the dates of those sales?

11 A. Correct.

12 Q. So if it was anyone's fault for not saying something about
13 the date, it was my fault for not asking the question, right?

14 A. I'll say yes to that.

15 Q. And you were simply answering the questions that I put to
16 you, not volunteering information. Right?

17 A. Correct.

18 Q. Have you ever testified before a jury before?

19 A. No.

20 Q. So that's the first time you've been on the witness stand
21 in this situation.

22 A. Correct.

23 Q. And you're an honest person?

24 A. I am.

25 Q. OK. Was the date of those sales at the amount \$4,480 the

1 point of your testimony about that figure?

2 A. No.

3 Q. What was the point you were trying to make about the amount
4 \$4,480?

5 A. It's just a very specific amount. \$4,480 is not something
6 that's rounded to the nearest hundredths, even to the nearest
7 thousandths. It stuck out to us. That was it.

8 Q. And that was not an amount that you pulled out of thin air,
9 \$4,480, right?

10 A. Correct.

11 Q. That was the amount that was actually in the appraisal that
12 came with the ring Tiffany bought at Costco, right?

13 A. Correct.

14 Q. So it's not something that was produced during discovery
15 during the case, right?

16 A. Correct.

17 Q. The investigator went in and that was in the box.

18 A. Yes. Yes.

19 Q. Just look at it for one second if you would. I want to go
20 to that appraisal, which is -- I have a book here. One second.

21 Plaintiff's Exhibit 58, can you pull it up, please?

22 THE COURT: Ms. Ng, can you switch to the plaintiff's
23 screen.

24 MR. MITCHELL: And can we enlarge that part of the --
25 thank you.

1 Q. There's a date of this appraisal that came with the ring
2 Tiffany purchased. What's the date?

3 A. April 13, 2012.

4 Q. And the ring was purchased six months later, in November
5 2012, correct?

6 A. Correct.

7 Q. Mr. Dabney was asking you some questions about sales in
8 November 2012. That was well after the date of this appraisal,
9 right?

10 A. Correct.

11 Q. And Mr. Dabney made it appear, from the questioning, as if
12 all of your exemplars of \$4,480 were from 2009, that they were
13 three years old, right?

14 A. Yes.

15 Q. Do you remember his question about the height of the
16 recession, I think he usually prefaced his questions; do you
17 remember that?

18 A. Vaguely, yes.

19 MR. MITCHELL: Turn, if you would, Mr. Cole, if you
20 would pull up line 4079?

21 THE COURT: Which document?

22 MR. MITCHELL: I'm sorry. 4079 of Plaintiff's Exhibit
23 82.

24 THE COURT: Thank you.

25 Q. All right. So we've enlarged here line 4079. You see some

G9LATIF2ps

Abrams - redirect

1 of the issues; the screen is not like we have TVs nowadays. So
2 a 4 by 3 screen instead of the other one. So that cuts things
3 off. So we've enlarged this as best we can to keep all the
4 information on this line.

5 And what's the date of that \$4,480 sale?

6 A. June 5, 2011.

7 Q. June 5, 2011. Did Mr. Dabney mention 2011 in any question
8 to you about \$4,480?

9 A. No.

10 Q. So the appraisal you got with your ring is dated April 13,
11 2012, and one of your exemplars is June 5, 2011.

12 A. Correct.

13 Q. So as late as 2011, there were sales reflected in Tiffany's
14 records at the price that's shown in the appraisal that Tiffany
15 received, \$4,480, from Costco. Correct?

16 A. Yes.

17 Q. So the jury doesn't think there's any attempt to hide
18 anything, we've already -- Mr. Dabney has already pointed
19 outlines 117 and 118. Mr. Cole, could you please pull up line
20 2201. Let's got all the dates in the record so there's no
21 confusion.

22 Line 2201, what's the date of that exemplar?

23 A. March 24, 2009.

24 MR. MITCHELL: OK. Mr. Cole, can we do line 2754.

25 (Pause)

1 MR. MITCHELL: Technological delay.

2 Q. Line 2754, what's the date of that exemplar?

3 A. February 16, 2010.

4 Q. And we already did line 4079, so let's go to line 5452.

5 What's the date of that?

6 A. January 15, 2010.

7 Q. So all of those exemplars show that from April 2009 through
8 June of 2011, in the records that you had prepared, there were
9 six examples of rings almost the same as the one you bought at
10 Costco, in terms of style and size, not quality, that used as a
11 comparable price the amount \$4,480. Right?

12 A. Yes.

13 Q. Was there something that struck you as odd about that?

14 A. I'm sorry, that struck me as odd about what?

15 Q. The fact that you were able to find in your records this
16 exact price.

17 A. Well, it was just an odd price, because it was the same
18 price that was on Costco's appraisal, which didn't match its
19 sales price.

20 Q. And this was what you had in your own Tiffany records, not
21 the Costco records, right?

22 A. Correct.

23 Q. And this was not a situation where you were testifying
24 about what the appraisal should have said, right?

25 A. No.

1 Q. The idea was that you were testifying about the fact that
2 you had been delivered an appraisal that seemed as if someone
3 had gone to a Tiffany store and priced a similar ring and used
4 that for the appraisal, right?

5 (Pause)

6 THE COURT: Consult.

7 (Counsel confer)

8 Q. Ms. Abrams, if someone had gone to a Tiffany store during
9 this sales period, or during this time period, and asked to
10 see, or a ring was on display of this type, was the price that
11 that ring sold for a secret?

12 A. No.

13 Q. Mr. Dabney said that your list that you had was
14 confidential. Why is the list confidential?

15 A. The list are sales records list, because it's the sales
16 records of a specific engagement ring, the Tiffany setting
17 engagement ring, which we don't report, as a public company, as
18 a separate line item.

19 Q. So the individual price of a particular ring at a
20 particular time can't be private or confidential, right?

21 A. No. A customer can come into the store, look at a ring,
22 ask for a sales price, and they will receive the retail sales
23 price of that particular ring.

24 Q. Now, if someone goes to a store and there doesn't happen to
25 be a .7 carat ring there but there is a .69 carat ring there,

G9LATIF2ps

Abrams - redirect

1 could they get the price of the .69 carat ring?

2 A. Absolutely.

3 Q. And you don't always have all sizes of all diamonds in all
4 rings at all times in stores, right?

5 A. Right.

6 Q. Also, Tiffany's prices are available online, aren't they?

7 A. Some prices, yes.

8 Q. So you were not -- withdrawn. Were you by this, these
9 exemplars, attempting to say that the Costco appraisal was
10 wrong in any way?

11 A. No. We were trying to just demonstrate that the Costco
12 appraisal had a price that was identical to a comparable ring
13 within Tiffany's inventory.

14 Q. And were you by your testimony yesterday in any way trying
15 to deceive anyone, the jury, the Court, or the audience about
16 what it was you were talking about?

17 A. Not at all.

18 Q. And is there anything I have neglected to ask you now that
19 you think should be said to clarify this even more, or do you
20 believe the jury understands the point of what you're saying?

21 A. I think the jury understands.

22 Q. OK. Thank you.

23 Now, let's turn our attention now to this letter that
24 Mr. Dabney was talking to you about from January of 2013 that
25 was written to me.

G9LATIF2ps

Abrams - redirect

1 First of all, this is not a letter that was sent to
2 you, right?

3 A. Correct.

4 Q. So to the extent you --

5 THE COURT: You're talking about DTX 487?

6 MR. MITCHELL: Yes. Thank you, your Honor. DTX 487.
7 Thank you. I apologize for that.

8 Q. DTX 487 is a letter from Costco's then counsel, Greenberg
9 Glusker, to me. It was not a letter that was sent to you, so
10 you were not -- correct?

11 A. Correct.

12 Q. Were you in direct communication with these lawyers?

13 A. No.

14 Q. So any information you had concerning what the lawyers
15 might have spoken to with each other is the subject of
16 conversations you had with your own counsel, correct?

17 A. Correct.

18 Q. And we all have the protection of attorney-client privilege
19 in America, so there is information that may have been the
20 subject of communication with your lawyers that is not,
21 obviously, the subject of public disclosure, correct?

22 A. Correct.

23 Q. And we all as citizens have this protection of
24 attorney-client privilege, including companies, right?

25 A. That's right.

G9LATIF2ps

Abrams - redirect

1 Q. And you know that as part of your day-to-day
2 responsibilities at work, right?

3 A. Yes.

4 Q. Now, turning first if you would -- turn away from 47 for a
5 moment and let's go to Defendant's Exhibit 209. Mr. Dabney
6 showed you this. And just look here. That's the date of the
7 initial communication from Tiffany to Costco about the
8 discovery of the ring in the Huntington Beach store, correct?

9 A. Yes.

10 Q. December 10, 2012. OK.

11 MR. MITCHELL: Now can we go back, Mr. Cole, to 487.
12 The whole document, please.

13 Q. The date of that letter is what?

14 A. January 31, 2013.

15 Q. OK. So we are now a month and a half, a little more, since
16 the initial demand letter. Right?

17 A. Yes.

18 Q. Let's walk through those paragraphs that Mr. Dabney pointed
19 out to you. Let me start at paragraph 1.

20 Now, at this point, had Tiffany been provided with any
21 documentation as far as sales records, signage information, or
22 other Costco actual records to support any statement that was
23 made in this letter?

24 A. No.

25 Q. Now, on 639911, it says that it has -- it says in the first

1 paragraph -- so -- withdrawn.

2 This is now the first substantive written
3 communication to Tiffany about what was going on at Costco with
4 respect to signs, right?

5 A. That's right.

6 Q. How long did Costco say in this letter that this item had
7 been for sale?

8 A. Since approximately 2003.

9 Q. And can you tell me from that paragraph what period of time
10 Costco provided sales records?

11 A. Only from fiscal 2012 and fiscal 2013.

12 Q. Right there, right?

13 A. Right.

14 Q. Right there. So this letter says Costco started using
15 Tiffany in one form or another in 2003, and in one paragraph of
16 a letter, with no backup, provided sales information for only
17 one fiscal year. Right?

18 A. That's right.

19 Q. Did you consider that full disclosure?

20 A. No.

21 Q. Let's go to paragraph 3. This is another item. When was
22 this item first sold by Costco?

23 A. Again, 2003. Or approximately 2003.

24 Q. What years were you given financial information for, in
25 this one paragraph?

1 A. Again, fiscal 2012 and fiscal 2013.

2 Q. Were you given any backup documentation?

3 A. No.

4 Q. I don't want to not ask you from paragraph 2. This one
5 started when?

6 A. Approximately October of 2011.

7 Q. Sales information from when?

8 A. Fiscal 2012 and '13.

9 Q. Any backup information?

10 A. No.

11 Q. And isn't it true that during the course of this litigation
12 we have since learned that there were other permutations of
13 signs that used "Tiffany" besides these?

14 A. Yes. And we were given no signage information in this
15 letter either.

16 Q. And also we have learned in this case that there were
17 different permutations of signs that used "Tiffany" in a manner
18 that the Court has defined as a standalone use.

19 A. Yes.

20 Q. So this letter was not only not complete; it was
21 inaccurate. Right?

22 A. You could say that.

23 Q. Two weeks after this letter is when Tiffany filed the
24 lawsuit. Right?

25 A. I'm sorry? Could you repeat that?

G9LATIF2ps

Abrams - redirect

1 Q. Two weeks after this letter is when Tiffany filed the
2 lawsuit.

3 A. Yes.

4 Q. Did you believe, when you saw this letter, that this was a
5 full and complete disclosure by Costco of all sales?

6 A. No.

7 Q. Now, Mr. Dabney showed you Defendant's Exhibit 52. Can you
8 turn to that.

9 A. Yes. Yes.

10 Q. Mr. Dabney suggested in his questioning to you that Costco
11 voluntarily delivered this to Tiffany. Do you remember that?

12 A. Yes.

13 Q. Do you recall that we asked for, in the context of this
14 lawsuit, that Costco produce a customer list showing all people
15 who purchased rings with "Tiffany" in signage. Do you remember
16 that?

17 A. Yes.

18 Q. Do you recall that Costco opposed that application?

19 A. I do.

20 Q. Do you also recall that we had to make a motion to
21 Magistrate Judge Freeman to compel Costco to produce this list?

22 A. Yes.

23 Q. Do you recall that Costco appealed the order of Judge
24 Freeman to produce this list?

25 A. Yes.

1 Q. And do you recall that Costco appealed the order of Judge
2 Freeman to Judge Swain?

3 A. Yes.

4 Q. And isn't it true that only after Judge Swain ordered
5 Costco to produce this list, that we got this list?

6 A. Yes.

7 Q. So this was hardly a voluntary production, right?

8 A. Correct.

9 Q. And Tiffany paid legal fees in connection with each of
10 those motions to compel Costco to give us this list.

11 A. Yes.

12 Q. And the production of this list came long after this
13 January 31, 2013 letter, didn't it?

14 A. Yes.

15 Q. This chart also shows what purports to be item numbers,
16 right?

17 A. Yes.

18 Q. Does it have any signage information?

19 A. No.

20 Q. So from this list --

21 MR. MITCHELL: Can we just enlarge this so the jury
22 can see it here, Mr. Cole. We have to do it in pieces.

23 THE COURT: Let's avoid people's names.

24 MR. MITCHELL: Yes. Let's not use the names, but we
25 can stick to this part in the trial. The jury will have a copy

1 of this. It is a spreadsheet. Can I walk and show it to the
2 jury, your Honor?

3 THE COURT: Yes.

4 Q. So someone -- someone -- Tiffany looking at this list can't
5 tell what any of these numbers relate to as far as what the
6 sign said in any individual warehouse at any given time, could
7 they?

8 A. Correct.

9 Q. So if Mr. Dabney claims that this document is full
10 disclosure of all sales made by Costco next to affected signs,
11 is there any way to tell from this document when you look at
12 it?

13 A. No.

14 Q. Do you know the number of names that appear on this list --
15 back up one second. If we look at this column, what's up on
16 the screen, Ms. Abrams, you see we have pluses and minuses?

17 A. Yes.

18 Q. And this was a document we had in a spreadsheet form,
19 correct?

20 A. Yes.

21 Q. So this document could be resorted to calculate the number
22 of names on the list, right?

23 A. Yes.

24 Q. So presumably this would be, in theory, gross sales, right?

25 A. Yes.

G9LATIF2ps

Abrams - redirect

1 Q. And the minuses would be subtracted to come to net sales,
2 right?

3 A. Correct.

4 Q. And this was just a list that was provided to Tiffany --
5 withdrawn.

6 Did you make any assumptions, when you saw it, when
7 this list was finally produced after all that motion practice,
8 as to what this universe of people was on this list?

9 A. Um, sorry. I'm not...

10 Q. Did you have a state of mind as to who these people were on
11 this list and why these people were included here?

12 A. Presumably these people were included to represent the
13 customers that had purchased this unit item in connection with
14 the signs that were in Costco using the Tiffany name.

15 Q. If we resorted it and used an Excel spreadsheet, we could
16 total how many people's names are on here, right?

17 A. Right.

18 Q. We could subtract returns, right?

19 A. Right.

20 Q. We could come up with a gross sales figure, right?

21 A. Correct.

22 Q. And a net sales figure.

23 A. Yes.

24 MR. MITCHELL: Thank you. I have no further
25 questions.

1 MR. DABNEY: May I have the Elmo again, please.

2 RECROSS EXAMINATION

3 BY MR. DABNEY:

4 Q. Ms. Abrams, if I could draw your attention back to the
5 buyer list which we were just discussing, Costco Exhibit 52.

6 Your counsel asked you a series of questions about entries.

7 I'm just going to put the first page up for just an example.

8 Did you ever count up the number of buyers that were on this
9 list?

10 A. Yeah. I believe so. I don't recall the exact number.

11 Q. Well, you know it's nowhere near 11,000, don't you?

12 A. Yes. It's not 11,000. That's correct.

13 Q. It's nowhere near 11,000.

14 A. Correct.

15 Q. So were you here when your counsel made a mention of 11,000
16 letters during his opening statement?

17 A. Yes.

18 Q. And Costco provided you with the actual mailing list that
19 your counsel referred to in October of 2013, didn't he?

20 A. I'm sorry. Can you just repeat --

21 Q. Costco provided your company with the actual mailing list
22 that was used for that -- that your counsel referred to --

23 A. Oh.

24 Q. -- in opening, didn't it? In October of 2013.

25 A. I don't recall, but yes.

1 Q. So you had the list more than three -- about three years
2 ago.

3 A. Yes.

4 Q. And you know it had nowhere near 11,000 names on it.

5 A. Yes.

6 Q. And that's con-- and the history here is -- your counsel
7 asked you about the discussion of the list -- it's true, isn't
8 it, Ms. Abrams, that in 2013 Costco proposed to your company
9 that Costco and Tiffany and Company together, with the
10 assistance of the Court, conduct a scientific survey --

11 MR. MITCHELL: Objection.

12 THE COURT: Consult.

13 (Counsel confer)

14 THE COURT: Keep your voices down.

15 MR. MITCHELL: Sidebar, your Honor.

16 THE COURT: Yes.

17 (Continued on next page)

1 (At the sidebar)

2 MR. MITCHELL: It has nothing to do with my direct.
3 He showed her a list. I established that the list doesn't have
4 signage information. Then there are names on the list. That's
5 all it is. It's not even established that it's a purchasing
6 list or it's the mailing list. I don't know what it is because
7 nobody has ever said what it is.

8 But that being said, that is an improper question.
9 The survey was denied. They made a motion to survey the list.
10 They had taken the list, according to Judge -- I think it was
11 to judge --

12 THE COURT: I remember the circumstances.

13 MR. MITCHELL: So it's an improper question. It
14 should not come in front of the jury.

15 I would ask also that the jury be instructed to --
16 that the opening part of the question be stricken and that the
17 jury be directed to disregard that.

18 MR. DABNEY: Plaintiff's counsel totally opened the
19 door to the motion practice before Magistrate Judge Freeman and
20 your Honor. Under counsel's questioning, he mischaracterized
21 the legal proceedings in this case, which began with an
22 application by Costco to your Honor for a protective order that
23 the parties conduct a joint survey with respect to the list.
24 Counsel saw fit to inject those court proceedings into this
25 case, and this is cross-examination about the very subject,

1 including specific mischaracterization of motions filed in this
2 court, to suggest by his questions that Costco was just
3 refusing to produce it, when in fact Costco was inviting the
4 plaintiffs, with the Court, to do a scientific survey. We're
5 entitled to dispel the false implication of counsel's
6 questioning of this witness about those events.

7 And I didn't ask her a thing about this. This was
8 brought up by them under their questioning. It's a straight
9 cross-examination of the very thing they saw fit to inject into
10 this case.

11 MR. MITCHELL: Mr. Dabney's examination of this
12 witness was, I would say implied if not directly said that
13 Costco voluntarily produced this document. And it took motion
14 practice to get this document. The impression left with the
15 jury was that this was something that Costco did as part of its
16 claim even though this information is different, when in fact
17 the Court knows that is not what happened here. And the fact
18 that had they --

19 THE COURT: Thank you. I have heard enough.

20 The objection is sustained. There has been litigation
21 at virtually every stage in this case as to production of
22 names. The direct did not materially mislead the jury as to
23 the production of the list of names, and introduction of
24 testimony with respect to the proposal for surveys and whatnot
25 injects a level of detail about the underlying litigation that

1 raises the very real prospect of waste of time and jury
2 confusion. And therefore, under 403, the objection is
3 sustained. And I will instruct -- I will simply remind the
4 jury that lawyers' questions are not evidence.

5 MR. MITCHELL: Thank you, your Honor.

6 (In open court; jury present)

7 THE COURT: Ladies and gentlemen, we're going to go on
8 to another question, but I remind you that the question of a
9 lawyer is never evidence, and you are to disregard unanswered
10 questions.

11 BY MR. DABNEY:

12 Q. Ms. Abrams, this list, let's just assume for the sake of --
13 Ms. Abrams, you don't claim to know what the criteria were that
14 were used by Costco to generate this list, do you?

15 A. No.

16 Q. So you don't know that, at the time this list was
17 generated, Costco might have written to people at times when
18 signs said "Tiffany setting," do you?

19 A. I'm not aware of Costco's practices, no.

20 Q. Costco might have written to people at times when signs
21 said "Tiffany set"?

22 A. I'm not aware.

23 Q. Costco might have written to people whose signs said
24 "platinum Tiffany" and "set" on the second line?

25 A. Again, not aware.

G9LATIF2ps

Abrams - recross

1 Q. Now, of the people on this list, let's just take a look at
2 this first page. Sitting here today, do you have any
3 information about whether any of these individuals listed -- I
4 won't call them out, but we have specifics, specific names
5 here. Do you have any information that any of these
6 individuals walked out of a Costco building with one of those
7 beige boxes that's on the jury rail and thought that the ring
8 that they had purchased was manufactured by Tiffany and
9 Company?

10 A. I don't know all the names on this list, but I do believe
11 that there were customers that were confused, yes.

12 Q. Can you identify anybody on any pages here that you think
13 walked out of a building with a beige box like what's on the
14 jury rail that thought that Tiffany and Company had made the
15 ring that was in the box?

16 A. This is not in alphabetical order, so I don't know certain
17 customers aren't on here.

18 Q. Let me ask a different question. Did you make an effort to
19 find that out, Ms. Abrams?

20 A. During the course of this litigation we had spoken to some
21 Costco customers, yes.

22 Q. Well, in fact you hired a company to telephone people on
23 the list, didn't you?

24 MR. MITCHELL: Objection, your Honor. I thought we
25 just went through this.

1 THE COURT: Sustained.

2 MR. MITCHELL: Thank you.

3 THE COURT: You may move on and, again, disregard the
4 unanswered question.

5 Q. So sitting here today, do you have a belief, Ms. Abrams,
6 with regard to, let's just take a page at random. We have all
7 the names and addresses of the people here. Are you prepared
8 to tell us any specific individuals on here that you believe
9 walked out of a building with one of those beige boxes thinking
10 that Tiffany and Company had made the ring and box?

11 A. I did not personally speak to customers on this page or on
12 this list, but we absolutely reached out to Costco customers
13 and understand that some of them were confused.

14 MR. DABNEY: Your Honor, I have nothing further.

15 THE COURT: Thank you.

16 MR. MITCHELL: Very brief.

17 THE COURT: This is the last round.

18 REDIRECT EXAMINATION

19 BY MR. MITCHELL:

20 Q. Mr. Dabney asked if you remembered anyone who was confused
21 by name?

22 A. Mm-hmm.

23 Q. Did we depose some individual customers I haven't gone
24 through, but presumably on this list?

25 A. Yes. Again, I -- it's not alphabetical so I can't see, but

G9LATIF2ps

Abrams - redirect

1 yes, we did.

2 Q. Andrew Pangellinan, do you remember that name?

3 A. Yes, I recall that name.

4 Q. Micah Day?

5 A. Yes.

6 Q. Pamela Miller?

7 A. Yes.

8 Q. Mr. and Mrs. Bentley?

9 A. Yes.

10 Q. Karina Roberts?

11 A. Yes.

12 Q. Did we take the depositions of all those people?

13 A. We did.

14 Q. Did Tiffany pay for those depositions? We had to travel to
15 take those depositions?

16 A. Yes.

17 MR. MITCHELL: Thank you. Nothing further.

18 MR. DABNEY: No further questions, your Honor.

19 THE COURT: Thank you, Mr. Dabney.

20 Thank you, Ms. Abrams. Your testimony is concluded.

21 THE WITNESS: Thank you, your Honor.

22 (Witness excused)

23 THE COURT: Plaintiff may call their next witness.

24 MR. MITCHELL: Brent Kaczmarek.

25 THE COURT: Good morning, Mr. Kaczmarek. Please come

G9LATIF2ps

Kaczmarek - direct

1 to the witness stand, step up, and remain standing for the
2 oath.

3 BRENT CHARLES KACZMAREK,

4 called as a witness by the plaintiff,

5 having been duly sworn, testified as follows:

6 THE COURT: Thank you. Please be seated.

7 DIRECT EXAMINATION

8 BY MR. MITCHELL:

9 Q. Good morning, Mr. Kaczmarek. How are you?

10 A. Good morning. I'm fine. Thank you.

11 Q. Would you please tell the jury your educational background.

12 A. Yes. I have a bachelor's of science in commerce, with a
13 specialty in finance.

14 Q. When did you graduate -- where did you go to college?

15 A. University of Virginia.

16 Q. When did you graduate?

17 A. Graduated in 1993.

18 Q. Do you have any professional certifications?

19 A. I do. I hold a designation called a chartered financial
20 analyst. It's a global designation awarded to professionals
21 demonstrating competence in valuation of investments and the
22 investment decision-making process.

23 Q. How do you become a chartered financial -- withdrawn.

24 How do you receive the chartered financial analyst
25 designation?

G9LATIF2ps

Kaczmarek - direct

1 A. There are three annual exams that you need to take and pass
2 within a seven-year period.

3 Q. And you passed those exams.

4 A. I did.

5 Q. By whom are you currently employed?

6 A. I am currently employed by Navigant Consulting.

7 Q. And where is Navigant located?

8 A. Their headquarters is in Chicago, but my office is in
9 Washington, D.C.

10 Q. How long have you been with Navigant?

11 A. Almost 15 years.

12 Q. What's your title?

13 A. Managing director.

14 Q. And what role did you fulfill at Navigant Consulting as
15 managing director?

16 A. I am in charge of our international arbitration practice at
17 Navigant, which has about 24 individuals.

18 Q. Can you describe to the jury, please, your primary role in
19 your job function at Navigant consultants.

20 A. Sure. I act as a consultant and as an expert witness in
21 disputes like this. Most of my cases are of an international
22 realm, as opposed to this one.

23 Q. And is there a focus that you provide expert testimony on
24 ordinarily?

25 A. Yes. Lost profits, lost business value, very common

G9LATIF2ps

Kaczmarek - direct

1 calculations that we do.

2 Q. Approximately how many expert opinions have you given which
3 involve the calculation of damages?

4 A. I have been retain as an expert in that capacity more than
5 130 times. Usually the cases I'm involved in require two
6 reports, so I would say somewhere more than 250 times I've
7 written expert reports on those subjects.

8 Q. And how many times would you say you testified before a
9 tribunal either in the United States or abroad?

10 A. I have testified 83 times.

11 Q. Have you ever been qualified as an expert for purposes of
12 calculating lost profits and damages reports?

13 A. I have always been qualified as an expert on that subject.

14 MR. MITCHELL: Your Honor, may I approach to hand the
15 witness an exhibit book?

16 THE COURT: Yes, you may.

17 MR. MITCHELL: Thank you.

18 Q. Mr. Kaczmarek, I have your book. Can you please turn to
19 the tab that shows Plaintiff's Exhibit PTX 140 for
20 identification.

21 MR. MITCHELL: Your Honor, I offer PTX 140 as
22 Plaintiff's Exhibit 140. Mr. Dabney has no objection.

23 MR. DABNEY: No objection.

24 THE COURT: Plaintiff's Exhibit 140 is admitted in
25 evidence and may be published.

(Plaintiff's Exhibit 140 received in evidence)

Q. Mr. Kaczmarek, would you describe for the jury what it is that Plaintiff's Exhibit 140 is.

A. This is a version of my CV that I issued with my first expert report in this case.

Q. What is the purpose of your CV? For those of the jury who don't know what a CV is, could you just briefly describe what it is and what it means for purposes of what you do. What do you intend to show by it?

A. Sure. A CV lists here educational background, professional background, and for someone like me we typically list all of the matters in dispute that I've served as an expert in before. So it's a lengthy list of different cases in which I have served as an expert.

THE COURT: Oh. Sorry about that. It's on the screen now.

MR. MITCHELL: Very good. Great.

Q. And is the purpose here to provide some synopsis of the types of cases you've had, what you did in those cases, so that people can read your qualifications?

A. Absolutely.

Q. So if the jury took this back to the jury room to see your qualifications, this would be something that you would stand by, correct?

A. Absolutely.

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Kaczmarek - direct

1 Q. And is this your current CV?

2 A. No. This was a CV I issued as of November 2013.

3 Q. And that was the time you were retained as an expert in
4 this case, correct?

5 A. That's correct.

6 Q. So this is current through November 2013.

7 A. Correct.

8 Q. Where did you work before you were employed at Navigant?

9 A. I worked for Arthur Andersen.

10 Q. And what did you do with Arthur Andersen? What's Arthur
11 Andersen?

12 A. Arthur Andersen was one of the, at the time, big six
13 accounting firms.

14 Q. What was your role at Arthur Andersen?

15 A. My role was very similar to my role at Navigant, except I
16 was much junior back then and did not serve as an expert. I
17 assisted others in preparing expert testimony.

18 Q. Do you have experience acting as an expert in connection
19 with retail businesses?

20 A. I do.

21 Q. What types of businesses -- what types of retail businesses
22 have you acted as an expert in connection with?

23 A. I have been involved in analysis of businesses selling
24 watches retail, luxury watches, duty-free shops, both in and
25 outside of airports, other commercial establishments within an

G9LATIF2ps

Kaczmarek - direct

1 airport, and shopping centers.

2 Q. Did any of those engagements involve the analysis of profit
3 margins?

4 A. Yes.

5 Q. Did you have to calculate gross profits and net profits?

6 A. Yes. In virtually every case that's a subject of my
7 testimony.

8 Q. Did you prepare expert reports or opinions in connection
9 with those analyses?

10 A. Yes.

11 Q. And was your expert report or testimony ever rejected by
12 any tribunal?

13 A. Never.

14 MR. MITCHELL: Your Honor, I offer Mr. Kaczmarek as an
15 expert to testify in this case.

16 THE COURT: Any objection?

17 MR. DABNEY: No objection.

18 THE COURT: The tender of Mr. Kaczmarek as an expert
19 is accepted.

20 MR. MITCHELL: Thank you, your Honor.

21 Q. Mr. Kaczmarek, when were you first hired to provide
22 services in this case?

23 A. I believe it was October 2013.

24 Q. What was it that you were hired to do?

25 A. I was hired to calculate the profits that Costco earned

G9LATIF2ps

Kaczmarek - direct

1 associated with their sales of rings that had "Tiffany" in the
2 signage.

3 Q. And did your assignment include differentiating sales from
4 one sign to another sign at that time?

5 A. No.

6 Q. So how did you -- or describe to the jury if you would how
7 you went about performing your services back in October of
8 2013.

9 A. Sure. I was provided with information that Costco had
10 disclosed on that subject, and I relied on that information in
11 performing my initial calculations despite the fact that I
12 indicated I was dissatisfied with the level of information that
13 I had to work with.

14 Q. And did you prepare a list of items that you were provided
15 to review for purposes of trying to calculate profits?

16 A. Yes.

17 Q. Can you turn in your book to PTX 141. Are you there?

18 A. I'm there.

19 Q. Can you describe for the jury what PTX 141 is.

20 A. This is a list of the documents that I considered in
21 performing my analysis.

22 Q. And that was back in October 2013.

23 A. Correct.

24 MR. MITCHELL: Your Honor, I offer PTX 141 as
25 Plaintiff's Exhibit 141.

1 MR. DABNEY: No objection.

2 THE COURT: Plaintiff's Exhibit 141 is admitted in
3 evidence and may be displayed.

4 (Plaintiff's Exhibit 141 received in evidence)

5 Q. Now, can we go down that page to the middle part of the
6 page. Right there. These individuals here, did you review
7 their deposition transcripts?

8 A. Yes.

9 Q. Who did you understand these individuals to be?

10 A. Mr. Jelenik was the CEO. Mr. Schutt, I think, was chief
11 merchandising officer. I forget Mr. Galanti's role.

12 Q. Chief financial officer?

13 A. Would most likely be. That would have been my guess. But
14 I, my memory fails me.

15 Q. And they had been deposed in the case a little more than a
16 month before you were retained, right?

17 A. Yes.

18 Q. Can you describe for the jury if you could what you
19 attempted to do from or based upon this list of documentation
20 that you were provided.

21 A. Yes. I was attempting to calculate, again, the profits
22 Costco earned from sales of diamond rings with signage that had
23 "Tiffany" next to it.

24 Q. And did you observe any issues that hindered your ability
25 to perform a profit calculation when you received these

1 documents?

2 A. I did, yes.

3 Q. Can you describe for the jury what some of the problems
4 were that you confronted when you tried to calculate profits
5 based upon what had been provided.

6 A. Sure. So for sales, all I had was what I would describe as
7 a summary spreadsheet that Costco had, I understand, produced
8 to Tiffany. Clearly there would have been underlying records
9 to that spreadsheet, but I was not provided with those.

10 I didn't understand how the item numbers, the universe
11 of item numbers, had been established.

12 I observed that some of the signage in that
13 spreadsheet didn't have the name "Tiffany" at all, so I
14 wondered how it was relevant.

15 I also observed that there were sales data in that
16 spreadsheet after Costco said it wasn't using the Tiffany name,
17 but based on that particular file, I presumed the information
18 was relevant, since Costco had produced it.

19 Q. And was it your understanding that the source of all of
20 this documentation and information was Costco?

21 A. Yes.

22 Q. Would you turn, please, to the page marked in your book DTX
23 258.

24 MR. MITCHELL: Your Honor, for the clarity of the
25 record, this is a defendant's exhibit. We would like to put it

1 in evidence. Mr. Dabney -- I offer it in evidence just so we
2 have it in the record.

3 MR. DABNEY: We have a copy that -- the copy
4 plaintiffs have marked is all chopped up. We have a copy.

5 THE COURT: If there's an objection, first consult and
6 if you can't work it out, we'll go in the corner.

7 (Counsel confer)

8 THE COURT: Please go closer together so that you
9 don't talk so loud.

10 (Counsel confer)

11 MR. MITCHELL: I think we have a, Mr. Dabney has a
12 copy of the same thing, it was his exhibit, but they have it in
13 a different form. That's fine. We're happy to use their
14 version. So I assume, then, there's no objection to it.

15 MR. DABNEY: No objection to the taped-together copy
16 of Defendant's Exhibit 258.

17 THE COURT: All right. Defendant's Exhibit 258 is
18 admitted in evidence.

19 (Defendant's Exhibit 258 received in evidence)

20 MR. MITCHELL: Thank you. May I approach the witness
21 with this?

22 THE COURT: Yes, you may.

23 MR. DABNEY: Your Honor, would it be appropriate for
24 us to publish a copy for the jury so they could follow along.

25 THE COURT: Well, this is Mr. Mitchell's examination.

1 MR. DABNEY: Thank you.

2 THE COURT: If he wants to, he may.

3 MR. DABNEY: I'm happy if you want the jury to have
4 it.

5 THE COURT: Thank you.

6 Q. Mr. Kaczmarek, was Defendant's Exhibit 258 one of the
7 documents you were provided with?

8 A. Yes.

9 Q. Given the unwieldy nature of it I presume you were provided
10 it in computerized form.

11 A. Yes.

12 Q. Does this version of Exhibit 258 represent an approximation
13 of what it was that you were provided with in connection with
14 your efforts to calculate profits?

15 A. Yes. This is one of the pages in the workbook, the Excel
16 workbook. There are other pages with dollar sales, but this
17 one was net sales.

18 MR. MITCHELL: Your Honor, Mr. Dabney would like to
19 provide the Court with a copy.

20 THE COURT: Yes. Thank you.

21 Q. Now, first, Mr. Kaczmarek, what were your observations
22 about this information when you first looked at it?

23 A. Again, it was very summary-level information, where I would
24 have expected detail data behind this. Somebody actually must
25 have had detail data to create it. Again, as I said, I wasn't

G9LATIF2ps

Kaczmarek - direct

1 sure how the universe of item numbers had been determined and
2 some didn't even have a Tiffany name.

3 I also recall, too, and as the sheet shows, there are
4 some rings that have negative sales, only returns, which
5 obviously can't be the case; you have to first have a purchase
6 before you have a return. So clearly there is some missing
7 data that was not compiled to create this.

8 Q. And so the jury can understand what you're saying about the
9 negative numbers, explain what you would expect a sales record
10 to show if there were returns as well as sales.

11 A. Sure. You would have obviously a positive unit sale, and
12 then you would have a negative unit sale. So it can't be lower
13 than zero. So anything that's negative clearly shows there is
14 missing data.

15 Q. So did you make any assumptions about the reliability of
16 this spreadsheet?

17 A. I had expressed that I was dissatisfied with this level of
18 information. But nonetheless I went ahead and made
19 calculations using it.

20 Q. Did you make any assumptions, at least about the sales
21 reflected on this document, in terms of their relevance to the
22 case?

23 A. I did not.

24 Q. Did you make any assumptions about this document in
25 connection with the need to provide a calculation of profits on

1 some amount that's reflected here?

2 A. I assumed all of these sales were relevant sales.

3 Q. Why did you assume that?

4 A. At the time I was unaware of whether there would be any
5 restrictions, and because Costco produced it all, I presumed
6 they were producing to Tiffany relevant information.

7 Q. In your experience as an expert, when you receive a summary
8 spreadsheet like this, are you ordinarily provided just a
9 spreadsheet, or does it usually come with something else?

10 A. No. We usually are provided with the underlying data,
11 because I would consider this what we would call work
12 product -- somebody took data and created something -- as
13 opposed to the underlying records reflecting the actual sales.

14 Q. Were you ever provided the underlying records that
15 supported the entries that appear on this spreadsheet?

16 A. Yes. I was ultimately provided with that data but after I
17 issued my first report.

18 Q. And did -- what type of underlying data were you provided
19 to review?

20 MR. MITCHELL: Your Honor, before I ask that question,
21 may I show this to the jury?

22 THE COURT: Yes, you may.

23 MR. MITCHELL: Thank you, your Honor.

24 (Pause)

25 Q. What type of underlying data -- what type of underlying

G9LATIF2ps

Kaczmarek - direct

1 data do you ultimately review in connection with Costco's
2 records of sales?

3 A. Well, in preparing my first calculation, I did have very
4 detailed data associated with purchase orders, so Costco
5 purchases, of rings. And that was data that I did analyze and
6 consider for my analysis.

7 (Continued on next page)

G9LFTIF3

Kaczmarek - direct

1 Q. Was there anything else you recall looking at?

2 A. That, well, I also looked at some testimony of Mr. Jelenik
3 about the average profit margin that they typically apply in
4 the jewelry section, which is 13 percent, and that's the profit
5 margin I ultimately applied in my calculations. That was due
6 to additional problems I saw in the purchase order file.

7 Q. Can you describe for the jury what the problems were you
8 saw in the purchase order file?

9 A. First, there were three items in this spreadsheet, DTX258,
10 that were not in the purchase order file. So no record of a
11 purchase of an apparently relevant ring sale. I saw instances
12 where there were lots of orders, but never fulfilled, which I
13 found a bit strange. There might be a record, for example, of
14 an order for 50 rings and only three are delivered and then
15 further orders following that. I would have thought the vendor
16 would have first filled the unfulfilled order without a need
17 for more orders. And then perhaps the most unusual aspect I
18 found with the file and the reason I primarily did not rely on
19 it, there were several records indicating Costco was selling
20 the ring below its cost, below the cost to acquire it. And it
21 was doing so in a repeated manner, apparently. So they'd buy a
22 ring for, say, 5,000 and sell it at 4,000 and then they'd buy
23 another two of the same ring for 5,000 and they'd sell it again
24 for 4,000.

25 And so the repetition of that to me did not make

G9LFTIF3

Kaczmarek - direct

1 sense, because Costco has very thin margins, but it doesn't
2 make any sense to actually buy a product and deliberately sell
3 it below the cost to acquire it.

4 Q. Were you able to match purchase orders to the ultimate sale
5 order?

6 A. No. We were not able to do that. We could really only try
7 to do it by total and there I found some problems too. In
8 instances for certain ring items, the number of purchases was
9 lower than the number of sales. So obviously I knew I was
10 missing additional purchase data. You obviously can't have a
11 sale unless you first purchase the ring. So we could not tie
12 up the information.

13 MR. MITCHELL: Mr. Cole, can you pull up Defendant's
14 258 to the screen? And scroll down a couple of pages, please.
15 Further, please. Still further. Can you blow this area up?

16 Q. This is a portion of this and there are other places this
17 appears but let me focus in on this. Negative entries appeared
18 this way. I'm circling them. Could you describe to the jury
19 the format so you know when something is a negative entry on
20 this chart?

21 A. Right. In Excel you can have two different formats. You
22 can either have a minus and a number or in parenthesis that
23 also reflects a negative number.

24 Q. So as a financial person analyzing profits is that an
25 immediate red flag to you?

G9LFTIF3

Kaczmarek - direct

1 A. Yes. It indicated to me we clearly did not have all of the
2 sales information to work with.

3 Q. Now, Mr. Kaczmarek --

4 MR. MITCHELL: Let's go back one page, Mr. Cole,
5 please. Go back one more page.

6 Q. So in this, just taking as an example, let's blow this up
7 down here. Okay. So right here we would see positive entries.
8 Do you see that?

9 A. Yes.

10 Q. Does the existence of the negative entries or your
11 knowledge that there are negative entries that don't make sense
12 in the spreadsheet affect the reliability of the positive
13 entries?

14 A. Yes. I think it would.

15 Q. Explain to the jury why.

16 A. Well, the existence of just the negative means we're
17 clearly missing data. How much data we're missing, whether
18 we're missing it just for those items or for other items, it's
19 very possible the way the data was put together that any of
20 these ring item figures could be different, could be higher if
21 data was overlooked.

22 Q. And the parenthesis would indicate subtractions from total
23 sales, correct?

24 A. Correct.

25 Q. So if a positive entry has within it improper negative

G9LFTIF3

Kaczmarek - direct

1 entries then the positive entry would be too low, is that
2 correct?

3 A. That would be correct. All of these are net sales,
4 represented to be net sales. So the gross would be higher if
5 there was a return.

6 Q. Now, Mr. Kaczmarek, in your expert opinion does the
7 information you just described to the jury cast doubt on the
8 reliability of the information reported in this document?

9 A. Yes.

10 Q. And do you believe based on your expert opinion that this
11 document is accurate and reliable?

12 A. For purposes of making a calculation of profit, it's all I
13 had to go by, so I went ahead and used it.

14 Q. But you did not believe it was complete or accurate,
15 correct?

16 A. Correct.

17 Q. Now, if you look --

18 MR. MITCHELL: Mr. Cole, can you back out of that for
19 a moment, and let's see if we can just highlight that top line,
20 somewhere around there.

21 Q. Now, this is an example of one entry, this is the top part
22 of the page. Do you see it says 2012, right?

23 A. Right.

24 Q. There appeared to be 13 months reported for 2012. Do you
25 see that?

G9LFTIF3

Kaczmarek - direct

1 A. I do.

2 Q. Can you explain to the jury what that means?

3 A. These -- Costco does not report on a calendar year basis.
4 They report on a fiscal year basis, and within each fiscal year
5 they have 13 fiscal periods I'll call them, since they're not
6 months. Each fiscal period is 28 days.

7 Q. And when you see a date, a date and month such as let's say
8 1/2013, which is right here on that report, when does that
9 date, or how does that correspond to a calendar date?

10 A. Right. So that does not represent January 2013. Costco's
11 fiscal year starts around the end of August, beginning of
12 September. It actually changes from year to year because of
13 this convention. So when you see a 1 it would correspond to
14 the first 28 days starting around the end of August or early
15 September. Of 2012. Excuse me. 2012.

16 Q. I'm sorry. Are you finished?

17 A. Yes.

18 Q. So 2013, let's say new year's for Costco would be
19 August 31, January 1, something like that?

20 A. The start of their fiscal period would always be the end of
21 August or beginning of September.

22 Q. Is this an unusual -- in your experience in the retail
23 business, is this an unusual way to report financial
24 information?

25 A. Yes.

G9LFTIF3

Kaczmarek - direct

1 Q. What's unusual about it?

2 A. Well, in my analysis looking at the performance of
3 businesses or companies, we typically like to look quarter to
4 quarter from one year to the next to see how they're performing
5 and you really can't do quarters with 13 months. It's not
6 divisible by four. So that I found somewhat unusual. Also,
7 their fiscal periods don't add up to 365 days, it's 364, which
8 is the product of 13 periods times 28 days.

9 Q. Now, ultimately, Mr. Kaczmarek, how did you rely, despite
10 those problems you just testified to, how did you use
11 Defendant's 258?

12 A. Well, I basically took the total number of ring sales
13 expressed in this sheet, so on the far right column where it
14 says grand total for each line item I simply summed those up,
15 including the negatives and applied the 13 percent profit
16 margin to the corresponding dollar sales for these units.

17 Q. Did you remember how many gross unit sales before
18 returns -- withdrawn. There were other variations of this
19 report, is that correct?

20 A. Right. There were four sheets. One was gross unit sales
21 and gross dollar sales and then one was net unit sales, which
22 is the one we've been looking at and then there were net dollar
23 sales.

24 Q. So do you recall the number of the gross unit sales that
25 were shown on another version of Defendant's Exhibit 258?

G9LFTIF3

Kaczmarek - direct

1 A. I believe it was 3807.

2 Q. Do you recall the net unit sales that were reflected?

3 A. Yes. I believe for this particular sheet it was 2688.

4 Q. And did you calculate what the total sales were based upon
5 these charts?

6 A. Yes. For the net sales associated with these units was
7 approximately 11.5 million.

8 Q. And did you calculate profits on those sales?

9 A. I did. At 13 percent it was approximately \$1.5 million.

10 Q. And I think you testified previously that the 13 percent
11 figure was derived from the testimony of Costco's CEO Craig
12 Jelenik, is that correct?

13 A. That's correct.

14 Q. And that was one of the deposition transcripts that you
15 reviewed?

16 A. Yes.

17 Q. Did you try to perform an actual profits analysis before
18 reverting to the 13 percent?

19 A. I did and that you'd have to use the purchase file and for
20 the reasons I described before, missing item numbers, sales at
21 apparent losses, I was not comfortable relying on that
22 information. So I applied the 13 percent margin instead.

23 Q. So the jury can understand, in your experience as an expert
24 in the retail field, is a 13 percent markup low?

25 A. Yes. Very.

G9LFTIF3

Kaczmarek - direct

1 Q. Why is it low? Why do you say it's low?

2 A. Well, that 13 percent is really just the difference, again,
3 between the price of acquiring the good, in this case rings,
4 and then what you sell it at. So that 13 percent difference
5 has to cover a number of other costs such as rent, your
6 employees, utilities, and at that small of a markup you
7 couldn't make money in the retail business covering those other
8 costs.

9 Q. How can Costco survive with such little markup?

10 A. They're able to survive with that low markup because they
11 charge membership fees annually. So they make most of their
12 money on the membership fees and so that's how they can
13 actually make such small profits on the items. That's what
14 attracts customers to want to go to Costco.

15 THE COURT: Mr. Mitchell, would you find a place to
16 stop in the next ten minutes?

17 MR. MITCHELL: I can stop now, your Honor. It's a
18 good spot.

19 THE COURT: All right, then, we will begin our morning
20 break now of ten minutes. Members of the jury, please be ready
21 in the jury room at 11:25 and continue to keep your minds open
22 and your thoughts to yourselves and thank you for working with
23 us. All rise and Ms. Ng will escort the jury out.

24 (Jury exits)

25 (Continued on next page)

G9LFTIF3

Kaczmarek - direct

1 (In open court; jury not present)

2 THE COURT: Mr. Kaczmarek, you may step down. All
3 right, would someone retrieve the exhibits from the front rail
4 of the jury box and I also have here the defendant's Ewa Abrams
5 binder and an exemplar of some anticipated plaintiff's exhibits
6 from a discussion yesterday that I don't need. So I'll just
7 give those back. Thanks so much. So see you all in ten
8 minutes.

9 (Recess)

10 oOo

11 THE COURT: Good morning again. Please be seated.
12 Mr. Kaczmarek, would you please come back to the witness stand?
13 And Ms. Ng, would you please bring the jurors in?

14 (Continued on next page)

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G9LFTIF3

Kaczmarek - direct

1 (In open court; jury present)

2 THE COURT: Good morning again, members of the jury.

3 We hope you had a good break. Please take your seats in the
4 jury box. And please be seated, everyone.

5 Mr. Mitchell.

6 MR. MITCHELL: Your Honor.

7 BY MR. MITCHELL:

8 Q. When we left off, Mr. Kaczmarek, we were talking about
9 13 percent markup. When you took the total units, gross sales
10 and net sales, how would you use that then? You could walk the
11 jury through the process, if you would, of calculating a gross
12 and net profit figure based upon those sales numbers.

13 A. So if you wanted to calculate the profits before returns
14 you could apply the 13 percent to gross sales. If you want to
15 calculate profit after returns you would apply 13 percent to
16 the net sales numbers.

17 MR. MITCHELL: Your Honor, can we get this turned on?

18 THE COURT: Yes.

19 MR. MITCHELL: Thank you.

20 Q. Just from the standpoint so we understand, so you would
21 take a total sales figure, you would take total sales figure,
22 that could either be in dollars -- it has to be in dollars,
23 right?

24 A. Correct.

25 Q. You multiply that times 13 percent and that then equals a

G9LFTIF3

Kaczmarek - direct

1 profit figure, correct?

2 A. Correct.

3 Q. So it's just a formula, it's just a simple mathematical
4 formula?

5 A. Exactly.

6 Q. So you calculated -- did you calculate profits based upon
7 this initial calculation that was derived from Defendant's
8 Exhibit 258?

9 A. Yes.

10 Q. And you based that on, I think you testified earlier, unit
11 sales of 2,688 rings, correct?

12 A. Correct.

13 Q. So you would take -- and that was, 2,688 rings sold for
14 \$11,472,291, which you said is about 11 and a half million
15 dollars, correct?

16 A. Correct.

17 Q. So you would take 11,472,291 times .13 and you said the
18 total calculated to approximately one and a half million
19 dollars?

20 A. Correct.

21 Q. I said the number was \$1,472,291. That sounds right?

22 A. That sounds right, yes.

23 Q. 1,472,291, so that's an easy calculation to make, right?

24 A. Yes, it is.

25 Q. And based upon that calculation, if you had the number of

G9LFTIF3

Kaczmarek - direct

1 unit sales, could you then estimate a profit per unit?

2 A. Yes.

3 Q. So depending upon what the number of units were you could
4 multiply that amount times the number of units, is that right?

5 A. You could take the profit 1,472,291 and divide it by 2688
6 and that would give you an average profit per unit of sale.

7 MR. DABNEY: Your Honor, we have an issue. Can I
8 confer?

9 THE COURT: Yes, please.

10 (Pause)

11 THE COURT: Would you angle yourselves more towards
12 the door? Thank you.

13 (Pause)

14 MR. DABNEY: Your Honor, may we have a sidebar?

15 THE COURT: Yes.

16 (Continued on next page)

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Kaczmarek - direct

1 (At the side bar)

2 MR. DABNEY: Your Honor, we once again have a
3 situation where the expert is going outside his expert report
4 and is injecting a new concept which is you could take all of
5 these disparate items, different sizes, different times,
6 including before the statute of limitations and after, and you
7 lump them together and you come up with an average price per
8 unit.

9 MR. MITCHELL: Profit.

10 MR. DABNEY: An average profit per unit which is some
11 kind of artificial construct which we're hearing about today,
12 September 20, for the first time in this litigation. It is not
13 a concept that was identified in his expert report. It is not
14 a concept we've ever validated, but it is apparently the
15 springboard to the new, totally never disclosed opinions that
16 they can come up with, this artificial profit per unit. Well,
17 then I could just come up with a totally new damages opinion by
18 multiplying that by what I now say are the total number of
19 sales. So we object to the plaintiff's repeated attempts to
20 introduce new theories into this case in the middle of the
21 trial that were never the subject of any prior opportunity to
22 Daubert, rebut, whatever.

23 THE COURT: Mr. Mitchell.

24 MR. MITCHELL: It's simple math. I just explained to
25 the jury simple math. The closing instruction that your Honor

G9LFTIF3

Kaczmarek - direct

1 has says that if you can't decide you should estimate, so based
2 upon our expert's report, this is how you take his numbers, if
3 you believe his numbers, but if he didn't have a complete set
4 of numbers he could take total sales, divide by total units,
5 come up with a profit per unit to assist the jury in helping
6 estimate what the profits would be if the jury concludes that
7 the records produced were inadequate.

8 It's a methodology just using math to do it. I
9 explained to them how they could do it if they want to go in
10 the back to do their own calculation which your Honor's closing
11 instructions offer the jury the opportunity to do in
12 estimating.

13 THE COURT: The objection to do-it-yourself
14 instructions for profit per unit is sustained. There is not to
15 my knowledge in this record any basis for establishing the
16 validity or reliability of a profit per unit across disparate
17 products. And so that element of the testimony is different
18 from the do-it-yourself arithmetic instructions for applying
19 13 percent to a dollar figure.

20 So is there a motion to --

21 MR. DABNEY: Yes.

22 THE COURT: First I just want to get clarity to what
23 I'm being asked to do. Is there a motion to strike the
24 testimony concerning computation of profit per unit?

25 MR. DABNEY: Yes, your Honor.

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Kaczmarek - direct

1 MR. MITCHELL: I accept that. The question was could
2 I ask, could I question the witness concerning percentage
3 against total sales.

4 THE COURT: You already did.

5 MR. MITCHELL: No. I'm saying if they choose a
6 different number, any number you choose, you can take the total
7 sales figure and multiply it by 13 percent.

8 THE COURT: Yes.

9 MR. MITCHELL: That's all I wanted to do.

10 THE COURT: And the motion to strike is granted and
11 I'll instruct the jury accordingly.

12 MR. DABNEY: Thank you, your Honor.

13 MR. MITCHELL: Thank you.

14 (Continued on next page)

G9LFTIF3

Kaczmarek - direct

1 (In open court; jury present)

2 THE COURT: Members of the jury, I am striking from
3 the record the testimony regarding computation of average
4 profit per unit. You are to disregard that testimony and
5 dismiss it from your minds. It is stricken from the case.

6 BY MR. MITCHELL:

7 Q. Approach this from a different way, Mr. Kaczmarek. If the
8 total sales in terms of a dollar amount were different than the
9 amount reflected in your report, could you multiply total
10 dollar sales times 13 percent to come out with a profit
11 calculation based upon a 13 percent profit margin?

12 A. Absolutely.

13 Q. Explain to the jury how you would do that?

14 A. Well, I had done a separate calculation, so give an
15 example, I did a calculation assuming there were 11,000 unit
16 sales, which I understand was the testimony of Mr. Schutt, that
17 that's about how many letters he approximated that were sent
18 out to customers. And so I came up with an adjusted amount of
19 dollar sales just scaling up all of the units to 11,000 and
20 applying the average sales in each fiscal period. And that
21 came out to about 47 million in sales. I just applied a
22 13 percent profit margin to that, and that came to about
23 6.1 million in profit.

24 Q. So if I said to you total sales were \$10 million as a
25 number, how would you calculate profit at 13 percent profit

G9LFTIF3

Kaczmarek - direct

1 margin on a \$10 million sales number?

2 A. 1.3 million.

3 Q. And that is the product of the multiplication of 10 million
4 times .13, correct?

5 A. Correct.

6 Q. And that formula would apply regardless of what total
7 number was you're starting with in terms of dollar sales,
8 correct?

9 A. Correct.

10 Q. So if the jury has to calculate or wants to calculate on
11 its own what it believes total sales were, it could simply take
12 whatever number it believes is the appropriate sales number and
13 multiply that by 13 percent to calculate what it believes
14 actual profits were based on a 13 percent margin, correct?

15 A. That's correct.

16 Q. Did you ever review a profit margin that Costco's expert
17 presented?

18 A. I did.

19 Q. And what was that profit margin?

20 A. It was 10.31 percent.

21 Q. So Costco's expert and you disagreed by approximately
22 2.7 percent, is that correct?

23 A. That's correct. Costco's expert utilized the purchase
24 order data that had the sales below cost, so he just
25 incorporated those negative profit sales into his analysis,

G9LFTIF3

Kaczmarek - direct

1 whereas I did not.

2 Q. Now, at the time you prepared your initial expert analysis
3 in October of 2013, had you reviewed the testimony of Douglas
4 Schutt, the chief merchandising officer of Costco?

5 A. Yes.

6 Q. And did you review any testimony of Mr. Schutt that you
7 thought had some potential application to the calculation of
8 damages in this case?

9 A. Yes. I referred to his approximation of 11,000 letters.
10 Obviously, from reviewing DTX258 I knew we had missing data, so
11 I ran an alternative calculation as I just explained assuming
12 11,000 sales.

13 Q. So did you take essentially the data that was shown in 258
14 and grow it in some way?

15 A. Yes.

16 Q. Explain to the jury how you do that? How do you take a
17 lower number and make it a reliably larger number?

18 A. So I took the sales, unit sales in each period and then I
19 proportionally grew them so that I got 11,000 in total. So
20 each fiscal period grossed up by the same percentage, such that
21 it solves for 11,000 units in sales. I then took the average
22 net sales in each fiscal period and multiplied it by those new
23 unit sales and that's how I got to 47 million.

24 Q. This was intended to be an estimate depending upon what may
25 have later come out in the case, right?

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Kaczmarek - direct

1 A. Yes.

2 Q. And it was based upon your concern that financial
3 information was missing based upon review of Exhibit 258,
4 correct?

5 A. Correct.

6 Q. So at the time you prepared your report you didn't know
7 whether 11,000 was right, but you knew that whatever was
8 reflected in Exhibit 258 was not right.

9 A. Correct.

10 Q. Okay. So if there were sales of 11,000 units what would
11 that equate to in gross sales?

12 A. That's 47 million is what I calculated.

13 Q. And approximately what would the profits be at 13 percent?

14 A. 6.1 million.

15 Q. Now, you initially, you relied upon Defendant's Exhibit 258
16 for your calculation of profits based upon a report from Costco
17 that purported to be actual sales records. Did there come a
18 time where you had to adjust your calculations?

19 A. Yes.

20 Q. Why did you have to adjust your calculations?

21 A. I subsequently was provided with underlying sales records
22 and those were accompanied with Costco's expert's report.

23 Q. And the sales records that you were provided with, did
24 those provide certainty to any calculations that you would have
25 been able to make had you had those figures earlier?

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Kaczmarek - direct

1 A. In my view, no. The sales records themselves don't have an
2 item description at all. It just says the item number, and I
3 wasn't certain whether or not, again, the item numbers
4 identified in that data set were the total universe of
5 engagement ring sales at Costco.

6 Q. Can you please turn in your book to the page stamped
7 DTX139? Can you describe what DTX139 -- first of all, did you
8 receive a copy of DTX139?

9 A. I did, yes.

10 Q. And can you describe what you understood DTX139 to be?

11 A. Yes. This is Exhibit 4 to Dr. Cornell, Costco's expert,
12 his analysis of the gross sales and net sales of what he termed
13 the relevant rings in this case.

14 MR. MITCHELL: Your Honor, I would offer Exhibit
15 DTX139 into evidence so it could be published to the jury?

16 MR. DABNEY: No objection.

17 THE COURT: Defendant's Exhibit 139 is admitted in
18 evidence and may be published.

19 (Defendant's Exhibit 139 received in evidence)

20 Q. So is this the, I'll call it the spreadsheet -- what would
21 you call it, spreadsheet or report?

22 A. It's a printout of a spreadsheet.

23 Q. Is this a copy of a spreadsheet that you saw that you
24 understood was prepared by Costco's expert, Dr. Cornell?

25 A. Yes, that's correct.

G9LFTIF3

Kaczmarek - direct

1 Q. And did you review this document?

2 A. I did.

3 Q. Could you tell the jury what your impressions were when you
4 first saw this?

5 A. Well, it was at even more of a summary level than what
6 DTX258 was at, and it was unclear as to precisely how he had
7 arrived at the figures he had arrived at.

8 Q. Why do you say that?

9 A. Because he hadn't provided any details in his report
10 explaining how he arrived at these figures.

11 Q. Did you ever review a document by which Dr. Cornell
12 purported to describe how he came up with his calculations?

13 A. Yes.

14 Q. And did you review that?

15 A. I did review it, yes.

16 Q. Did you understand it?

17 A. I understood it, but it lacked a lot of details necessary
18 for me to basically replicate what he had done.

19 Q. Were you able to identify where it was that Dr. Cornell
20 started his calculation that's contained on DTX139?

21 A. Yes. In my view he must have started the calculation
22 relying on DTX258, because that's the only, this spreadsheet is
23 the only thing that really ties the item number to a sign. The
24 sales file does not have signs or item descriptions, the
25 purchase file does not have item descriptions or signs. So

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Kaczmarek - direct

1 this had to be sort of a starting point for his analysis.

2 Q. So what's marked as Defendant's Exhibit 258 is the document
3 that had all of the problems that you testified to you received
4 in October, correct, October 2012?

5 A. Correct.

6 Q. Or 2013, correct?

7 A. 2013.

8 Q. So if Dr. Cornell started from that document to build his
9 analysis, embedded within Dr. Cornell's analysis would be the
10 same problems that you found in DTX2589, right?

11 A. Yes. For example, I believe Dr. Cornell identified 150
12 instances through his analysis where there was a return but no
13 purchase.

14 Q. What did he do with that?

15 A. He just excluded the return data, which is an implicit
16 assumption that there's only 150 purchases missing, which I
17 think is a substantial assumption to make.

18 MR. MITCHELL: One moment, your Honor.

19 (Pause)

20 MR. MITCHELL: May I have a moment, your Honor?

21 THE COURT: Sure.

22 MR. MITCHELL: Thank you.

23 (Pause)

24 BY MR. MITCHELL:

25 Q. Mr. Kaczmarek, did you prepare in this case a declaration

G9LFTIF3

Kaczmarek - direct

1 that was filed in June of 2014?

2 A. Yes.

3 Q. And did you have attached to that declaration a copy of
4 what was provided to you as the analysis and work papers of
5 Dr. Cornell?

6 A. Yes.

7 Q. And did you review that analysis and those work papers?

8 A. I did.

9 Q. And did you attempt to follow what it was that Dr. Cornell
10 explained he had done to prepare DTX139?

11 A. I did.

12 Q. Can you explain to the jury whether there were some things
13 in there that you saw that were unreliable in terms of how he
14 prepared that document?

15 A. Well, it's a 16-page document explaining how he went about
16 doing his analysis, as well as how Costco's systems operate.
17 And there were several instances in his steps where we tried to
18 replicate the entire analysis. We couldn't because he just
19 didn't provide sufficient detail for us to do so.

20 Q. Do you remember all of the steps that you counted on? Is
21 there anything in particular that you remember or if you had a
22 copy would it refresh your recollection? I'm not trying to
23 make this a memory test.

24 A. It would help if I had a copy. I don't recall all of the
25 steps.

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Kaczmarek - direct

1 MR. MITCHELL: I would propose to hand the witness a
2 copy of his declaration so he can look at it to the extent to
3 refresh his recollection about how and what it was he observed
4 in Dr. Cornell's report or explanation in his report that he
5 found problematic.

6 MR. DABNEY: Your Honor, we have an objection. I'll
7 confer with counsel.

8 THE COURT: Would you please? Thank you.

9 (Pause)

10 THE COURT: Gentlemen, would you move a bit further
11 out?

12 (Pause)

13 BY MR. MITCHELL:

14 Q. Mr. Kaczmarek, do you recall a figure 3C in Dr. Cornell's
15 explanation?

16 A. Yes. There were some examples he provided as to how he
17 matched records from the different files that he was provided
18 by Costco.

19 Q. And can you describe for the jury what it was you saw was a
20 problem with some of that?

21 A. Sure. So he had the sales file as well as a member file
22 and a returns file. And he linked them together and he
23 provided some examples of how that linking worked and 3C, as I
24 recall, was an example of a particular person where first she
25 bought a ring, so he showed the record of the purchase, and

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Kaczmarek - direct

1 then it was voided. And then the person bought it again. And
2 so he tried to show how to identify a voided sale versus what's
3 a return. Because six months later or so I think his data
4 showed the person went to a different Costco and returned the
5 ring. But then that person just minutes later bought the exact
6 same ring again at the same price. And then what he has
7 explained in that, his understanding of the data is, a return
8 is when you leave the store, right? So if you look at the ring
9 and you don't want it at the cage he explained that that's a
10 void. But this person apparently after buying the exact same
11 ring for the same price left the store and came back minutes
12 later and returned the ring again. So that was one of the
13 examples he provided of how the data linked, but I think the
14 substance of the data looks a bit funny, is an odd behavior,
15 someone returning and buying and returning the same ring over
16 and over.

17 Q. Did you ultimately believe that Dr. Cornell's calculation
18 in DTX139 was reliable?

19 A. I don't believe it's reliable. I believe because he is
20 using DTX258 in particular he's made an assumption that the
21 signs were the signs used in the time frames that this document
22 shows. You can see the time frames he's assumed. But there's
23 no way of knowing this, and I haven't seen any detailed
24 documentation from Costco purporting to show when a sign was
25 used and what the content of the sign actually was. So he's

G9LFTIF3

Kaczmarek - direct

1 making a substantial assumption in that regard in my view. But
2 nonetheless, as another alternative I provided a calculation
3 assuming his numbers were right.

4 Q. And these, this supposed breakdown on a sign-by-sign basis,
5 was that materially different than what you saw in DTX258 or
6 mostly just a regurgitation of that?

7 A. It's mostly a regurgitation, but you can see from his
8 spreadsheet there are several instances where he says the signs
9 were being used don't even use the Tiffany name. That's what I
10 had observed already from DTX258. So again, why, if that sign
11 is truly correct it shouldn't even be part of the analysis.
12 Something's wrong clearly in the way this information is being
13 compiled.

14 Q. So what if any information did you use from Dr. Cornell's
15 report to adjust your profits calculation?

16 A. So the bottom of the, his spreadsheet indicates 2,498 sales
17 at approximately 10.6 million.

18 MR. MITCHELL: Could you put up DFX139, please? Go to
19 the bottom half of the page.

20 Q. Is that helpful?

21 A. Yes.

22 Q. Could you tell the jury, then, what portion of
23 Dr. Cornell's report you used?

24 A. I just used the totals, which you can see on the screen,
25 because, again, I have no reason to know or understand how

G9LFTIF3

Kaczmarek - direct

1 these signs were attached to the item numbers for periods of
2 time and whether or not the signs actually read like they say
3 they read. So I took his total in the far right column,
4 10,553,593 and I multiply that by 13 percent and got a profit
5 figure of about 1.4 million.

6 (Continued next page)

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Kaczmarek - direct

1 Q. If you would calculate profits based on gross units, it
2 would simply be taking a different figure. How would you do
3 that?

4 A. You could take the gross sales of 13.9 million and multiply
5 it by 13 percent.

6 Q. Did you rely on these total amounts at the bottom because
7 you did not find the breakdown in his chart reliable?

8 A. That's correct.

9 Q. Is that why -- withdrawn.

10 Would you ever issue an analysis for use in a legal
11 proceeding where you did not have confidence that the amounts
12 you were reflecting were accurate?

13 A. I would typically try to provide an answer in any event,
14 but I would certainly qualify it quite heavily in the report to
15 indicate that I was concerned about the information I was
16 getting and, you know, it may not be a reliable calculation.
17 And that's actually, I provided that qualification in my first
18 report.

19 Q. If the jury disagrees with you and believes Dr. Cornell's
20 breakdown of sales on a sign-by-sign basis is reliable after
21 listening to all the evidence, do you have a separate
22 broken-down analysis that would refute his calculation?

23 A. I do not.

24 Q. So if the jury finds that Dr. Cornell's breakdown is
25 reliable, as opposed to unreliable as you testified, then the

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1 jury should rely on his breakdown for purposes of calculating
2 damages; is that correct?

3 A. They could do that if they so desired.

4 Q. Or they could take bits and pieces, choose rings that are
5 covered, rings that aren't covered, total sales, and multiply
6 that by 13 percent, correct?

7 A. Precisely.

8 Q. Your belief, though, is that there's no way to do that
9 reliably so you should use the total figures for all ring sales
10 because everything that's broken down is a bit of a mess,
11 right?

12 A. That's a fair way of putting it, yes.

13 Q. You are not sitting here testifying today that you believe
14 Tiffany should recover profits for sales of rings that are not
15 covered by the Court's order of what it is entitled to recover
16 for, are you?

17 A. Of course not.

18 Q. Is your testimony limited to the fact that what Costco
19 provided cannot be reliably broken down, so the first stopping
20 point, where you can have a reliable number at least, is
21 Dr. Cornell's totals; that would be one spot, right?

22 A. That's fair, yes.

23 Q. And that also assumes that Dr. Cornell counted all sales of
24 signs with "Tiffany" on them, correct?

25 A. Correct.

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Kaczmarek - direct

1 Q. Did you in fact ever analyze sign data to determine whether
2 in fact Dr. Cornell had included all signs, from its signage
3 data, that reflected Tiffany in the signage?

4 A. I did.

5 MR. MITCHELL: I hate to do this to you, but may I
6 hand the witness this pile of documents?

7 THE COURT: Yes, you may. You have companions.

8 MR. MITCHELL: This is the top, so I'll put the bottom
9 here.

10 Q. Mr. Kaczmarek, I have placed in front of you a stack of
11 bound volumes of paper. Do you see that?

12 A. I do.

13 Q. Can you describe for the jury what that is.

14 A. This is what we have been referring to as the signage data.
15 So it's the number of records that have sign descriptions and
16 dates that they were apparently in a database in a warehouse.

17 Q. I unfortunately made a mistake. The last volume, I think,
18 is on the bottom, but I would like you to pull out the last
19 volume, so if you need somebody to help you pick, I would --

20 THE COURT: Can you help --

21 MR. MITCHELL: He's got it, he's got it. He's doing
22 very well.

23 Q. Is that the last volume of all the sign data?

24 A. It appears to be, yes.

25 Q. And can you give me the number of the line, of the last

1 line of sign data.

2 THE COURT: Are you offering --

3 MR. MITCHELL: Oh, I'm sorry. Thank you, your Honor.

4 I would offer Plaintiff's Exhibit 64 into evidence.

5 MR. DABNEY: May I voir dire the witness about this,
6 your Honor?

7 THE COURT: Would you consult first and then...

8 (Counsel confer)

9 JUROR NO. 5: Your Honor, could we just move them so
10 we can see the witness? Thank you.

11 MR. MITCHELL: May we have a sidebar, your Honor?

12 THE COURT: Yes.

13 (At the sidebar)

14 MR. DABNEY: We have a pile of documents with no
15 sponsoring witness. These records, again, were not part of the
16 experts' reports or any discovery. So they are coming in based
17 on your Honor's rulings earlier. So the proffer of evidence
18 has been made without a sponsoring witness. And we don't know
19 how these were selected. This is a selected subset. We don't
20 know who selected it. We don't know what criteria were used to
21 select it. We don't know anything about it really, other than
22 that it arrived last week in two bankers boxes from plaintiff's
23 counsel.

24 So our position simply is, if they want to lay a
25 foundation for entering these documents in evidence through a

1 sponsored witness, that's fine. That's not this witness.

2 THE COURT: Mr. Mitchell.

3 MR. MITCHELL: I can go back to say, that's wrong, but
4 he's had this document for a very long time. But putting that
5 aside, I thought we had resolved this yesterday. This is the
6 document from which the spreadsheet we talked about this
7 morning was derived. And this is the underlying data from
8 Costco. It's Costco's data that the expert used to create that
9 spreadsheet, the document we talked about, so I thought that's
10 what we spoke of yesterday.

11 Mr. Dabney also had a pile of this on his desk and we
12 discussed the admissibility of this document and the Court said
13 it could come in, because he has already made this motion, and
14 the Court denied it.

15 THE COURT: Yesterday you're talking about, we didn't
16 talk specifically about foundation and authentication of the
17 particular sets of exhibits. And so you need to do something.
18 What do you want to do?

19 MR. MITCHELL: I would lay more of a foudnation, have
20 him describe what the document is. And I thought we were
21 getting it in under agreement, so I didn't know this would be
22 an issue. It's their data. It's part of the data that this
23 expert had. It's part of the data that was provided after he
24 had his expert report that he analyzed in order to examine
25 Dr. Cornell's report.

1 THE COURT: Mr. Dabney, I want as clear an indication
2 of the depth of your investigation -- to the extent that
3 Mr. Mitchell represents that this data was taken from what's
4 called the January 1, 2014 data set provided by Costco, are you
5 saying that you're going to require him to call a Costco
6 witness to authenticate that that data set came out of Costco's
7 records before this witness can then say, I took that data set
8 and I examined it in this way and manipulated it in that way?

9 MR. DABNEY: Yes. And the reason is, as your Honor
10 ruled, I thought, they have to lay a foundation for these
11 documents before they can ask their expert about them. This is
12 not -- we have a witness with all of the records that were
13 produced to them in electronic form. I expected that Kaczmarek
14 would go on after our witness so that the meaning of these
15 documents, the completeness of these documents, the content of
16 the documents would be understandable. This witness has no
17 clue as to what these documents signify. There's all kinds of
18 headings and columns, information that this witness has no idea
19 about. This is a problem when they're going outside the expert
20 report.

21 So our position simply is, no foundation has been laid
22 for this made-for-litigation subset, which as your Honor knows
23 we have objections to in the way it's been characterized, and
24 obviously they will try to characterize through this witness,
25 who has -- no foundation has been laid that he knows anything

1 about the content of the documents. He said over and over
2 again it's unreliable, unreliable, unreliable, and yet now they
3 want him to identify documents that he doesn't pretend to
4 understand.

5 So I can't help it that they decided to put this guy
6 on before the foundational witness that I fully expected them
7 to call. But I don't think that this is a proper way to
8 short-circuit the rule of evidence to get in a compilation that
9 some person made of records, who didn't know what he was doing
10 and doesn't know what they are. I can't cross-examine him
11 about these documents. He doesn't know what they are.

12 MR. MITCHELL: Mr. Dabney had our orders of witnesses.
13 He knew, we discussed it the other day, that it was coming in
14 through this witness. I understood Mr. Dabney to be objecting
15 to the offer of that document through this witness because this
16 witness is the one who created the chart. So what he's saying
17 is not what he said the other day. He may argue that now, but
18 that's not what he was talking about. This is data, Costco
19 data. This is an expert who analyzes data. We provided this
20 to your Honor on the motion for summary judgment. This is the
21 source of the chart that your Honor had on the summary judgment
22 motion. It's simply data. It has sign -- for instance, for
23 Mr. Dabney to say he doesn't know what it is, anybody knows
24 what it is. It's what he's relying on, because he's saying,
25 they're only relying on summaries. So Dr. Cornell's

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1 description of all the signs has to derive from this particular
2 document, because there's no other place for it. They produced
3 it to us. It is a subset of millions and millions of lines of
4 signage data. And it is an extraction of all the signs that
5 said "Tiffany" in every permutation that will result in the
6 jury not look at those but the summary of what they list that
7 Mr. Dabney has had two years.

8 MR. DABNEY: I have a practical suggestion. Peter
9 Hesketh, who does know the contents of the originals of his
10 documents, all of which are on defendant's -- not this subset
11 but the actual business records that were produced, is
12 available. He is here to answer questions. And this line of
13 questioning could be deferred until Mr. Hesketh is examined and
14 he can be asked questions to create the basis, the foundational
15 basis on which a witness could be asked to interpret these
16 documents. But just to go -- what they proposed, to make a
17 proffer of documents that the witness has no knowledge of, no
18 foundation of as to their accuracy, completeness, whatever, we
19 think there is no basis under the rules of evidence for doing
20 it, and --

21 MR. MITCHELL: May I just make one point.

22 THE COURT: Yes.

23 MR. MITCHELL: As Mr. Dabney just said, at
24 Mr. Hesketh's deposition, when I showed him pages from this,
25 Mr. Dabney objected about this. So he deprived me of the

1 opportunity to question Mr. Hesketh about it. That's why it
2 ended up going to the expert to analyze what was in the data,
3 because he obstructed him from getting that evidence before.
4 And now he's trying to force me to bring that witness, who was
5 produced as a 30(b)(6) witness. He wants me to call that
6 witness back so he can obstruct me from concluding with my
7 expert, getting him off the stand, letting him to leave. He's
8 known about this since Mr. Hesketh's deposition in February
9 2014.

10 THE COURT: I am going to permit this examination to
11 continue without prejudice to reaching the conclusion that
12 plaintiff is to strike the testimony if the origin of the data
13 is not established in a fashion that I deem appropriate by the
14 end of the plaintiff's case. And I do, as the judge, have the
15 responsibility and ability to determine the conduct of the
16 presentation of evidence.

17 MR. DABNEY: Well, he can rely on what -- there was a
18 ruling. There was an offer to proffer the document in
19 evidence. And that was what we have objected to. If they want
20 to question the witness about it, that's proper.

21 THE COURT: I am permitting it in evidence subject to
22 a later application.

23 MR. MITCHELL: Also, I'm happy to show it to
24 Mr. Hesketh, have him identify it as Costco signage data. Is
25 that what you want me to do?

1 THE COURT: It's admitted subject to connection. So
2 I'm granting the application to admit this identified document
3 as an exhibit and we'll revisit it if necessary in the future.

4 MR. DABNEY: Thank you, your Honor.

5 MR. MITCHELL: Thank you.

6 (Continued on next page)

1 (In open court; jury present)

2 THE COURT: What is the exhibit number, Mr. Mitchell?

3 MR. MITCHELL: PTX 64.

4 THE COURT: PTX 64 is admitted in evidence.

5 (Plaintiff's Exhibit 64 received in evidence)

6 Q. Mr. Kaczmarek, I ask you to turn to the last page of that
7 compilation spreadsheet. Can you just tell the jury, please,
8 what line number is reflected there?

9 A. 213,761.

10 Q. So this is an Excel spreadsheet, correct?

11 A. Correct.

12 Q. So Excel spreadsheets start with line no. 1 being the
13 heading, correct?

14 A. Correct.

15 Q. So you really start on line no. 2, right?

16 A. That's right.

17 Q. So how many lines of data are in Plaintiff's Exhibit 64?

18 A. 213,760.

19 Q. Now, what did you understand this data to consist of?

20 A. I had understood it to be records of signs that were
21 maintained by each warehouse of diamond engagement rings.

22 Q. Whose records did you believe -- withdrawn.

23 Whose records did you believe this data was extracted
24 from?

25 A. From Costco.

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1 Q. And was there any -- did this data include signage
2 information as far as you understood it?

3 A. Yes, it does.

4 Q. And are you able, in -- just so we can -- let's blow
5 something up right there. This is just an example of how the
6 data is reported in this, correct?

7 A. Yes.

8 Q. What this shows is what was understood to be signage data,
9 correct?

10 A. Correct.

11 Q. And where it says WISGN1, 2, and 3, did you make any
12 interpretation of what you thought that was?

13 A. Line 1, which is column J, would be the first line of the
14 sign, the next column would be the second line of the sign, and
15 the third column the third line of the sign.

16 MR. MITCHELL: Can we go to the right side of that
17 page, please.

18 THE COURT: Mr. Mitchell, unless you're going to be
19 asking the witness to delve into the other volumes, I ask that
20 that stack be taken away so that the jury can have a full view
21 of the witness.

22 MR. MITCHELL: Yes. Sorry about that, your Honor.

23 Keep that one. I don't want anybody to trip.

24 Would you like -- is there place to put it?

25 THE COURT: Well, if --

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1 MR. MITCHELL: I think I can use electronic, yes.

2 THE COURT: Thank you.

3 Q. And if we look at the right side of the columns, you can
4 see information that says "FS year" and "FS period." Do you
5 see that?

6 A. Yes.

7 Q. Did you interpret what those entries meant?

8 A. Yes. It would mean that a particular warehouse had in its
9 records the signs shown in columns K, L, and M in fiscal period
10 2 thousand -- fiscal period 13 of fiscal year 2012.

11 Q. And did you go to the left side of this page? Were there
12 other columns that you were able to easily identify within
13 that?

14 A. Yes. Column A is the department for jewelry. B is the
15 item number. C is the vendor. D is a suffix that often is
16 just zero. E is a buyer. F is the landed cost. That's the
17 cost of acquiring a particular ring. The next column is
18 generally zero. H repeats E for some reason. And then I is
19 the warehouse number depicting a unique store.

20 Q. And in the performance of your duties as an expert witness,
21 have you ever had occasion to review raw data, underlying data,
22 that's not necessarily identically like this but you have
23 experience in looking at things like these?

24 A. All the time, yes.

25 Q. Is this complicated for you?

1 A. No.

2 Q. And this was an Excel spreadsheet that you had?

3 A. Yes.

4 Q. Is this data sortable?

5 A. Absolutely.

6 Q. So are you capable of sorting out signs and sign
7 permutations one from the other?

8 A. Absolutely.

9 Q. Did you ever do that?

10 A. What I ended up doing was, I found how many unique signs
11 there were, how many unique combinations of line 1, 2, and 3 in
12 the data. And I found that there were 16 unique signs, all
13 having the name Tiffany in them. And then I counted up how
14 many times each of those signs appeared in the data.

15 Q. Now, would you turn in your book, please, to PTX 133.

16 MR. MITCHELL: Your Honor, may I approach with a
17 replacement 133?

18 THE COURT: Yes, you may.

19 MR. MITCHELL: Thank you.

20 Q. Can you describe what PTX 133 is.

21 A. Yes. This is a summary of the analysis that I did and just
22 described. You see there were 16 unique signs in the 213,760
23 records. And then I counted up how many times they existed in
24 the record, and the range of dates in use for that record.

25 Q. And, Mr. Kaczmarek, what was the source of the data that's

1 contained in the spreadsheet?

2 THE COURT: Are you offering the spread sheet?

3 MR. MITCHELL: I was going to offer it after this
4 question.

5 THE COURT: Thank you.

6 A. It was the spreadsheet in electronic form corresponding to
7 all your binders.

8 MR. MITCHELL: Your Honor, I offer PTX 133 as
9 Plaintiff's Exhibit 133.

10 MR. DABNEY: Counsel repeats its earlier objection.

11 THE COURT: The objection is overruled and the exhibit
12 is admitted. Plaintiff's 133 may be displayed.

13 (Plaintiff's Exhibit 133 received in evidence)

14 Q. Now if we could walk through this chart briefly. Could you
15 describe for the jury what portions of the larger signage data
16 are summarized in this spreadsheet.

17 A. So I summarized the data by the combination of line 1, 2,
18 and 3. Again, those are all unique combinations. And then I
19 counted up how many records arose of data you could find in the
20 entire file for that unique combination. So, for example, the
21 first line appeared in the data 24,469 times. And you see the
22 total matches out to the total we saw earlier of 213,760.

23 Q. And the date "dates in use" column, could you describe for
24 the jury what that is, please.

25 A. That's a summary of the range of dates corresponding to

1 that fiscal year and fiscal period that we saw at the end of
2 the file. So the first line, I consulted the sign in the
3 records from 2007 to 2013.

4 Q. What I would like to do is to take, maybe we can do it in
5 some way that the jury can follow this, but hopefully we can do
6 it with the screens, but I would like you to walk through what
7 information you observed from your spreadsheet from your
8 analysis of Plaintiff's Exhibit 64 that appeared to be missing
9 from Dr. Cornell's breakdown analysis.

10 MR. MITCHELL: It might be easier to use the overhead
11 as opposed to the...

12 Q. I'm going to try to do this by highlighting it and matching
13 the highlighting from one chart to the other, if you give me a
14 moment.

15 OK. So starting with the first line, 1 CTW diamond
16 round solitaire Tiffany ring, 24,469 entries in the report. Do
17 you see that?

18 A. I do.

19 Q. Was there any problem -- and I'm going to highlight that in
20 orange to keep track of it easily. Can you tell me if there
21 was any issue with respect to that sign entry in Dr. Cornell's
22 report.

23 A. That sign was in his summary report, yes.

24 Q. Were there any errors in Dr. Cornell's report based upon
25 that sign?

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Kaczmarek - direct

1 A. For that particular sign, there was one gross sale, zero
2 net sales.

3 Q. So for a sign that is reflected in Costco's signage records
4 for the entire statute of limitations period of 2007 to 2013,
5 Dr. Cornell only reports one gross sale and zero net sales. Is
6 that what you're saying?

7 A. Yes, correct.

8 Q. Did you form any conclusion -- I will show that here. Did
9 that cause you to form any conclusion concerning the
10 reliability of that calculation by Dr. Cornell?

11 A. The data seems to suggest that that would be highly unusual
12 to have signs at particular warehouses for such an extended
13 period of time and have zero net sales.

14 Q. And how about the dates reflected in Dr. Cornell's report
15 where he says the signage was used? Was that correct?

16 A. It differs from the signage data. His report suggests it
17 was stopped in 2010, whereas the signage data suggests records
18 were still at the warehouses through 2013.

19 Q. And Dr. Cornell also said that the time period started in
20 2008, did he not?

21 A. Yes, fiscal period 9 in 2008.

22 Q. So your observation from the actual records is that this
23 was in use from 2007 to 2013, correct?

24 A. Correct.

25 Q. So this would be incorrect that Dr. Cornell -- and correct

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Kaczmarek - direct

1 would be 2007 to 2013. And his report shows that nothing was
2 sold, next to that sign, correct?

3 A. On that basis, correct.

4 Q. Now, let's look at the next line. I'm referring to
5 Plaintiff's Exhibit 133, your summary report.

6 A. Yes, on the second line?

7 Q. Yes.

8 A. I was not able to find that in his summary, the particular
9 signage.

10 Q. So line no. 2, which reflects 160 sign entries over a
11 period of time 2007 to 2013, where the word "Tiffany" appears
12 in the sign, there is no signage data at all reflected in
13 Dr. Cornell's report, correct?

14 A. That's correct.

15 Q. How about the next line?

16 A. The next line, that I do recall finding in Dr. Cornell's
17 reports.

18 Q. Was there a problem that you observed with respect to what
19 Dr. Cornell's report reported concerning these items?

20 A. Yes. I had observed there was a different number of unique
21 signs that were in his report compared to what I found in the
22 signage data. And besides line 2, I found that line 7 and line
23 9 for those particular signs also do not appear in his summary
24 analysis.

25 Q. Line 7 and line 9.

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Kaczmarek - direct

1 So let's first go back to the one I have in blue here
2 and look at Dr. Cornell's report. These are the 1 carat
3 princess cut and 1 carat round diamond. In Dr. Cornell's
4 report, those are reflected in these two entries, correct, the
5 last two entries on the bottom of PTX 139?

6 A. Yes, that appears correct.

7 Q. Your records, though, your spreadsheet indicates that these
8 signs are present in the signage data from 2007 to 2013,
9 correct?

10 A. Correct.

11 Q. Dr. Cornell's report of these scenes, or the data for these
12 signs, shows that they are only there for a period that's
13 shorter than that, correct?

14 A. Correct.

15 Q. So the raw signage data appears to show signs that are in
16 use in the system for a longer period of time than Dr. Cornell,
17 correct?

18 A. Correct.

19 Q. The pen is what you observed, is that correct?

20 A. That's correct.

21 Q. 2007 to 2013.

22 A. Correct.

23 Q. Now, in going back and preparing for your testimony today,
24 did you observe there was one, call it one error in terms of
25 signage information that was contained in your chart, in going

1 back and preparing for today?

2 A. I did. It's the fifth line. It should -- the line 2,
3 column 2, should read "diamond solitaire," not "solitaire
4 Tiffany."

5 Q. So the word was wrong, but you observed that that was in
6 his report. You just had the wrong word there. You didn't
7 report that as any error of Dr. Cornell; it was a mistake of
8 one word in your report, in your spreadsheet, correct?

9 A. Correct.

10 Q. Anything else that you observed was wrong in the
11 spreadsheet?

12 A. No.

13 Q. The green entry, "1 carat princess cut diamond solitaire,"
14 that shows that that was in use from 2007 to 2013, correct?

15 A. Correct.

16 Q. And if we look at that line in Dr. Cornell, he shows that
17 it was only in use in 4/2013, correct?

18 A. That's correct.

19 Q. Is there anything else wrong with that information in
20 Dr. Cornell's report?

21 A. The signage displayed in what you highlighted in green is
22 different than what was on my summary of the signage. You can
23 see in his report it doesn't have the word "Tiffany" at all.
24 But the big signage data indicates that the sign that we looked
25 at, line 7 of my table, did have the word "Tiffany" in it. So

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Kaczmarek - direct

1 it is a different sign for the same item.

2 Q. And the sign that Dr. Cornell's report says was present is
3 "1 carat princess cut diamond solitaire white gold ring," no
4 "Tiffany" in the wording at all, correct?

5 A. Correct.

6 MR. MITCHELL: Mr. Cole, can we go back to the
7 computer for one moment and pull up line 60 of Plaintiff's
8 Exhibit 64, page 1,828. Can we just enlarge this area for the
9 moment.

10 Q. Is this the sign data that you observed in the raw records
11 that you reviewed and summarized?

12 A. That's correct.

13 Q. And as opposed to the sign saying, as Dr. Cornell said, "1
14 carat princess cut diamond solitaire white gold ring," you
15 observed it said "1 carat princess cut diamond solitaire ring
16 white gold Tiffany style," correct?

17 A. Correct.

18 Q. And how long did you observe that that usage was in place?

19 A. From 2007 to 2013.

20 Q. And there is no indication in Dr. Cornell's report of any
21 sales in connection with any sign like that, correct?

22 A. Correct.

23 Q. And then lastly, if we go back to --

24 MR. MITCHELL: Can we go back to the overhead one
25 second.

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Kaczmarek - direct

1 Q. You had another entry at the bottom highlighted that we
2 went through that was wrong. It was another one that's just
3 not on Dr. Cornell's report, correct?

4 A. Correct.

5 Q. So Dr. Cornell's report appeared to be -- to the extent
6 that Dr. Cornell purported to report sales of every sign that
7 had "Tiffany" in it, based on a review of the raw signage data,
8 there were clearly signs that were not reported in
9 Dr. Cornell's report, right?

10 A. Correct.

11 Q. Now let's look at Dr. Cornell's report. I have highlighted
12 the changes you had. Let's look at Dr. Cornell's report,
13 because I want to ask you some questions about some other
14 things.

15 Now that we have modified Dr. Cornell's report to
16 reflect what was there, we have a ring at the bottom, 140513, 1
17 CTW diamond round solitaire Tiffany ring. You see that?

18 A. Yes.

19 Q. That shows that that sign in the raw data was used for a
20 period of six years. Correct?

21 A. Correct.

22 Q. But the report of Dr. Cornell shows that in the entire
23 six-year period, there were zero sales. Correct?

24 A. Correct.

25 Q. Does that make any sense to you?

1 A. It doesn't make sense that you'd have records for every
2 fiscal period for six years for a sign and have no sales over
3 such a long period.

4 Q. As an expert in analyzing profits for companies, did that
5 cause you to form an opinion as to the completeness of Costco's
6 records concerning its report of sales next to the signs, or in
7 connection with signs?

8 THE COURT: Do you want to consult.

9 (Counsel confer)

10 MR. MITCHELL: I withdraw the question.

11 Q. Looking at the entries -- well, let's go back a second.
12 You adjusted your profit calculation based upon a criticism
13 that Dr. Cornell made of your initial expert report, in which
14 he said you included items beyond the appropriate period in
15 your first report. Correct?

16 A. I made that observation in my first report, but, yes, he
17 said it should be adjusted.

18 Q. In response to Dr. Cornell's criticism of your first
19 report, you adjusted your own figures, correct?

20 A. Yes. I tried to replicate what he did. I got different
21 numbers, about 11 million in total net sales. But I ran a
22 profit figure presuming his analysis was right.

23 Q. And you had testified earlier that you found that
24 Dr. Cornell's breakdown of sales per sign was unreliable. You
25 did say that, correct?

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Kaczmarek - direct

1 A. Yes.

2 Q. Is one of the reasons you found it unreliable the fact that
3 there appeared to be signs present in Costco records for long
4 periods of time for which no sales were reported?

5 A. Yes.

6 Q. And if we take a look, Mr. Dabney had said in his opening
7 that Costco, in coming clean and all this, had dropped --
8 originally said "setting" and then went to "set" and ultimately
9 somebody made a mistake and dropped that entirely. Does the
10 entry, just as an example, 140513, show that the phrase
11 "solitaire Tiffany," without "set" or "setting" is reflected in
12 the Costco sales information, dating back to 2007?

13 A. Correct. From 2007 to 2013, they used the word "Tiffany"
14 without any modifier.

15 (Counsel confer)

16 MR. MITCHELL: I'm sorry. I may have misspoken.
17 Mr. Dabney is correct. I said "sales information." Mr. Dabney
18 said "signage information." I misspoke. I'm sorry. I was
19 referring to Mr. Dabney's opening where Mr. Dabney said signage
20 information changed and it went originally from "setting," to
21 "set," to drop entirely.

22 Q. And I would also call your attention to the first entry,
23 the first line of entries here, which shows the use of
24 "solitaire Tiffany" without any modifier dating as far back as
25 2007. Correct?

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Kaczmarek - direct

1 A. Correct.

2 Q. So your review of the signage data that's summarized in
3 your spreadsheet indicates that the word "set" or "setting" did
4 not appear in certain signage at Costco as far back as 2007.
5 Right?

6 A. That's correct.

7 Q. And that is the earliest date on which you were provided
8 records. Correct?

9 A. That's correct. It could -- the use or the presence of the
10 records could certainly go back earlier, but that's the
11 starting period at which the data was provided.

12 MR. MITCHELL: I have nothing further, your Honor.

13 THE COURT: Thank you.

14 Mr. Dabney, we'll have 15 minutes to the lunch break.

15 MR. DABNEY: Your Honor, may I approach the witness
16 with a binder, please?

17 THE COURT: Yes, you may.

18 MR. DABNEY: Your Honor, may I also approach the
19 witness with a copy of Defendant's Exhibit 52, which is in
20 evidence?

21 THE COURT: Yes, you may.

22 MR. DABNEY: I believe your Honor has a copy of this
23 one.

24 THE COURT: 52 I have, right.

25 MR. DABNEY: 52, yes. Thank you.

1 MR. MITCHELL: Do you have a binder for us?

2 MR. DABNEY: Yes. Yes.

3 MR. MITCHELL: Your Honor, one thing before Mr. Dabney
4 proceeds. Can I have Mr. Kaczmarek just initial these, so in
5 case I want to refer to them as a demonstrative later, I could
6 identify them?

7 THE COURT: Yes. And perhaps we ought to call that,
8 what was that, 133A or something like that?

9 MR. MITCHELL: OK. I'll make 133A the spreadsheet.

10 THE COURT: It's the marked copy.

11 MR. MITCHELL: And Defendant's 139, make it DTX 139A.

12 THE COURT: All right. And you'll ask Mr. Kaczmarek
13 to initial and date those now.

14 MR. MITCHELL: Thank you, your Honor.

15 THE COURT: So 133A and 139A as described are
16 admitted.

17 (Defendant's Exhibits 133A and 139A received in
18 evidence)

19 CROSS EXAMINATION

20 BY MR. DABNEY:

21 Q. Good afternoon, Mr. Kaczmarek.

22 A. Good afternoon.

23 Q. As I understand it, Mr. Kaczmarek, one of the things that
24 you were hired to do by the plaintiffs was to give testimony
25 with regard to the number of sales of certain diamond ring

1 items that Costco made. Is that right?

2 A. That was part of the analysis, yes.

3 Q. And did you consider any actual sales records,
4 Mr. Kaczmarek, before you gave your first expert report in the
5 case?

6 A. I considered the spreadsheet that was marked DTX 258, but
7 nothing else in detail, because I didn't have any detailed
8 sales records.

9 Q. Mr. Kaczmarek, were you here for the testimony of
10 Ms. Abrams?

11 A. Yes.

12 Q. Did you hear my questions and her answers about the buyer
13 list that was given to the plaintiffs in October of 2013?

14 A. I do recall that.

15 Q. Did you hear her give testimony that she believed that
16 buyer list had been provided to you, Mr. Kaczmarek?

17 A. That buyer list had definitely not be provided to me. I
18 specifically mentioned that in my first report.

19 Q. So when Ms. Abrams testified -- let me pull it up on the
20 document camera. This is Defendant's Exhibit 52, which has a
21 control number on it 37765. You're saying that you were not
22 provided with a buyer list in this case by the plaintiffs
23 before you gave your first expert report.

24 A. That's correct. I explicitly stated so.

25 Q. Did you ask plaintiff's counsel if they had sales records

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Kaczmarek - cross

1 relevant to these items, Mr. Kaczmarek?

2 A. Yes.

3 Q. And what did they tell you?

4 A. That all we had was the spreadsheet, that no sales
5 records --

6 Q. Plaintiff's counsel didn't tell you that they had the
7 actual sales records that they were asking you to give
8 testimony about?

9 A. Prior to issuing my report in early November, no.

10 Q. And you actually had asked them for that, didn't you?

11 A. We had asked for any information relevant to calculating
12 profits.

13 MR. MITCHELL: Could -- objection, your Honor.

14 THE COURT: Please consult.

15 (Counsel confer)

16 MR. MITCHELL: Your Honor, may I see you at sidebar,
17 please?

18 THE COURT: Yes.

19 (Continued on next page)

1 (At the sidebar)

2 MR. MITCHELL: I know all of this was contemporaneous
3 with motion practice, which is getting this document, which was
4 supposedly the purpose of this. I don't have a problem with
5 Mr. Dabney asking this witness, did you review it, did you see
6 it, did you get it. That's fine. But for him to say, did you
7 know that they withheld it from you, with all those histrionics,
8 is completely improper, because as your Honor knows, it was
9 like pulling teeth to get this from them. That they're now
10 calling this sales records when in fact that was supposed to be
11 the customer list, not sales records, his questionig now is
12 completely misleading. And because this was the subject of
13 heated debate between Judge Freeman and in front of your Honor
14 as well, let him ask the questions after he has established the
15 fact, didn't see it. He can argue whatever he wants
16 afterwards, but these are not sales records.

17 THE COURT: The objection that it is improperly
18 argumentative and containing inflammatory characterizations is
19 sustained. Seek to rephrase, to ask the question in a more
20 straightforward way. I think you've already gotten your answer
21 a couple of times, but --

22 MR. DABNEY: Thank you, your Honor.

23 MR. MITCHELL: Can we have clar -- because your Honor
24 knows, he's called them "sales records." This was the purchase
25 list that we fought hard to get, not sales records.

1 THE COURT: This is a compiled list, not --

2 MR. DABNEY: Oh, no, no, no, no. This list has the
3 sales information on these items. It has the sale date, the
4 item number, the price, the buyer, everything. It is a --

5 THE COURT: It's not --

6 MR. DABNEY: It is more than just a buyer list.

7 THE COURT: It's not --

8 MR. MITCHELL: But there was -- I'm sorry.

9 THE COURT: It's not raw data. It's the compiled
10 report, a compiled list.

11 MR. DABNEY: It is an extraction from our sales
12 records of those records they wanted, which was who got the
13 letters. So the history here is, we provided the actual
14 mailing list. They said that's not enough, we need more
15 information. So we provided them immediately with lists that
16 provided the member name, address, sale price, everything,
17 everything in the Exhibit 52 in evidence. So the point I'm
18 trying to make simply is that they had it, they knew they had
19 it.

20 We now have a conflict in the testimony. Ms. Abrams
21 testified that they provided this document to this witness, and
22 this witness is saying he never got it. And one of the
23 fundamental issues in this case, your Honor, is that the sales
24 records were not relied on by their expert even though
25 plaintiff's counsel had them. And it's not just this subset of

1 the sales records. They also had the basic sales records that
2 they also didn't give the expert.

3 THE COURT: You have established that this document
4 had been provided. The witness has acknowledged his
5 nonpossession of it and nonreliance on it. You have the
6 earlier testimony from Ms. Abrams that she agreed to have them
7 provided. So that part of the foundation of your argument is
8 established. You may go on.

9 MR. DABNEY: Thank you, your Honor.

10 MR. MITCHELL: Here is my issue as the fact -- because
11 what the jury has heard is inconsistent with the manner in
12 which this document was presented. I can at least recall the
13 chronology. Mr. Dabney never tells a hundred percent of the
14 truth. When we pulled teeth to get this information --

15 THE COURT: It --

16 MR. MITCHELL: No, here's what happened, your Honor.
17 I just want to let you know. The jury should know this. This
18 was presented as the contact information to reach out so we
19 could find customers who were actually confused. This was
20 never sought as sales information for the expert's report.
21 What was provided as the sales information was that DTX
22 document, the long spreadsheet. So the fact that it happens to
23 show the item number and the purchase price, that was not the
24 reason -- and it's completely reckless. We fought over this
25 because we wanted to communicate with these individual

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Kaczmarek - cross

1 purchasers. And that's this document. Now what Mr. Dabney is
2 doing is misleading the jury into thinking that he produced
3 this like a sales record in October, and it's just not the way
4 the record is in this case. It's incorrect. And the Court
5 knows that. That's why I would like some ability to correct
6 this, the misimpression with the jury. Ms. Abrams didn't give
7 it to Ms. Kaczmarek.

8 THE COURT: It's now two minutes to one. We'll come
9 back at 1:55. And you can propose some evidentiary approach
10 for me to consider if you, you know, are considering this
11 particular material as to Tiffany's understanding or use of
12 this document. You may or may not still want me to do that at
13 the end of lunch.

14 MR. MITCHELL: What's in my mind is simply that your
15 Honor made a ruling with respect to these particular records,
16 and the issue of these being sales records was not the subject
17 of that motion. I would like some clarification that these
18 documents were produced in connection with Tiffany's request to
19 get specific purchaser information with contact information so
20 that we could reach out to these purchasers. There are two
21 versions of this. One didn't even have that.

22 THE COURT: I'm not going to testify to that. I'm may
23 give rulings, but I'm not going to become a witness in this
24 case.

25 MR. MITCHELL: Can we at least -- I'm just asking a

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1 question as a question, your Honor, one final question. The
2 production of this material was following a motion, something
3 to that effect.

4 THE COURT: Which is not going to go to your point.
5 So you can think about whether there is a witness you want to
6 call or recall to say, when we had this in hand, it was in the
7 context of reaching out to people, we considered it a customer
8 list. But --

9 MR. MITCHELL: I may recall Ms. Abrams on that one
10 subject.

11 THE COURT: Either way. We can talk about it later.

12 MR. MITCHELL: Thank you.

13 THE COURT: So it's 1 o'clock. Can we just break for
14 lunch?

15 MR. DABNEY: Yes.

16 (In open court; jury present)

17 THE COURT: Ladies and gentlemen, thank you for your
18 work with us this morning and your patience as we are sorting
19 issues out. We are now going to begin the lunch break. So
20 please be ready in the jury room at 2 o'clock to proceed, and
21 remember not to discuss the case or anything or anyone having
22 anything to do with it in any way. Don't reach out for any
23 outside information. And please enjoy your break and your
24 lunch.

25 All rise. Ms. Ng will take the jury out.

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1 (The jury left the courtroom)

2 THE COURT: You may step down, Mr. Kaczmarek.

3 (Witness excused)

4 THE COURT: Counsel, we'll reconvene at 1:55.

5 MR. MITCHELL: Thank you, your Honor.

6 THE COURT: Thank you.

7 MR. DABNEY: Your Honor, I know it goes without saying
8 that Mr. Kaczmarek will not be in communication.

9 THE COURT: Mr. Kaczmarek, you are under
10 cross-examination. You are not to discuss your testimony or
11 any anticipated testimony with anyone. Do you understand that?

12 THE WITNESS: Understood, your Honor.

13 THE COURT: Thank you.

14 (Continued on next page)

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Kaczmarek - cross

AFTERNOON SESSION

2:05 p.m.

(In open court; jury present)

THE COURT: Good afternoon, jurors. Welcome back. Please take your seats in the jury box. And please be seated, everyone.

Members of the jury I have two things to tell you before we get started. One is that we have been asked to have the temperature raised here a little bit. I understand that it gets a little bit chilly for people who aren't in a big black dress, so we're going to do something about that.

I also want to remind you tomorrow is our early day, we'll be finishing the proceedings at about 2 and we'll have a half hour break for lunch. So if you want to bring a sandwich so you can relax during lunch I encourage you to do that.

Mr. Dabney?

BY MR. DABNEY:

Q. Good afternoon, Mr. Kaczmarek.

A. Good afternoon.

Q. Before the lunch break I was asking you about the buyer list which has control number 37765 on it. Do you recall those questions?

A. I do.

Q. You were asked on your counsel's examination about a document that was received in evidence as Defendant's Trial

G9LFTIF5

Kaczmarek - cross

1 Exhibit 139. This is the one that Dr. Cornell prepared that
2 you were asked about. Do you recall that?

3 A. I do.

4 Q. And if we look on the reverse side of Dr. Cornell's report
5 where he talks about the documents that he considered, one of
6 the documents that he considered is document Costco 37765,
7 correct?

8 A. Correct.

9 Q. Now, when did you first realize, Mr. Kaczmarek, that
10 Dr. Cornell had relied on document 37765, the buyer list, which
11 you say plaintiff's counsel never provided to you?

12 A. Probably when he issued his first report.

13 Q. So did you ask for a copy of that?

14 A. Yes.

15 Q. Did you get it?

16 A. Yes.

17 Q. When did you get it?

18 A. I don't specifically recall.

19 Q. Well, how soon after December, 2016 would you say,
20 Mr. Kaczmarek, you received a copy of the buyer list 37765?

21 A. I don't recall.

22 Q. Month?

23 A. I don't recall.

24 Q. Well, you gave a second declaration in this case that your
25 counsel asked you about in June of 2014, right?

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Kaczmarek - cross

1 A. Correct.

2 Q. You had 37765 at that time, didn't you?

3 A. Yes.

4 Q. So at that point you had the actual buyer list that
5 Ms. Abrams testified about, didn't you?

6 A. Yes.

7 Q. And you didn't mention that in your second declaration, did
8 you?

9 A. I did not, no.

10 Q. But what you did talk about was the number of records in
11 certain signage files that Costco had produced to you, right?

12 A. Among other things, yes.

13 Q. Was it your idea to leave out any mention of the sales
14 records in either your first or your second written submissions
15 in this case, Mr. Kaczmarek?

16 A. I didn't leave out that omission.

17 Q. I thought I understood you to say, Mr. Kaczmarek, that you
18 were dissatisfied with the summary sales records that you based
19 your first expert report on. Didn't I hear you say that right?

20 A. That's correct.

21 Q. And you're saying you don't recall exactly when you
22 received the buyer list, Costco 37765, is that your testimony?

23 A. Correct.

24 Q. Were you dissatisfied with that, too?

25 A. I was dissatisfied with a number of files, yes.

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Kaczmarek - cross

1 Q. Well, I'm asking specifically about the buyer list, 37765.
2 Are you testifying here today -- let's take a look at the first
3 page of the buyer list, which has -- let's zoom in.

4 THE COURT: That's Trial Exhibit 52?

5 Q. Trial Exhibit 52. We have here a series of entries for
6 item 140513. Do you see that, sir?

7 A. I see that.

8 Q. And in your first expert report you relied on a spreadsheet
9 that showed that there were no net positive sales of that item
10 during the six years prior to February 14, 2013, isn't that so?

11 A. Correct.

12 Q. And so if we look at -- I'd like to hand the witness a
13 copy, a more readable copy of Exhibit 258. With the Court's
14 leave I'd like to hand up to the -- do you have your exhibit
15 book up there, Mr. Kaczmarek?

16 A. I have a binder you've provided me.

17 Q. Would you look at Defendant's Trial Exhibit 233?

18 Mr. Kaczmarek, does Defendant's Exhibit 233 appear to be the
19 summary of net sales units and net sales dollars that you
20 relied on in providing your first report in this case?

21 A. Yes, it does.

22 MR. DABNEY: Your Honor, Costco offers Defendant's
23 Exhibit 233 in evidence.

24 THE COURT: Just for the Court's information, clarity,
25 is this the same as the taped together --

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Kaczmarek - cross

1 MR. DABNEY: The summary of net unit sales is a
2 one-page piece of paper that is the taped up 258.

3 THE COURT: And this is different?

4 MR. DABNEY: And Defendant's Exhibit 233, the other
5 part of it is the net sales dollars as opposed to net unit
6 sales.

7 THE COURT: The thing that I have that I took out of
8 the pocket in mine behind the 233 tab says sum of net sales
9 units in the upper left-hand corner, but there's another thing
10 in the pocket, so -- are there two different things?

11 MR. DABNEY: There should have been two different ones
12 in the binder.

13 THE COURT: I want the record to be clear and I want
14 to be sure. So there is another thing in the pocket that says
15 sum of net sales dollars at the top. So is it just the sum of
16 net sales dollars that you're offering as 233 or both of those?

17 MR. DABNEY: They are both tabs of the original Excel
18 document, Defendant's Exhibit 233.

19 THE COURT: All right, so now that we've clarified
20 what 233 is, is there any objection to the admission of 233?

21 MR. MITCHELL: No, your Honor.

22 THE COURT: Thank you. Defendant's Exhibit 233 is
23 admitted and it may be published.

24 (Defendant's Exhibit 233 received in evidence)

25 MR. DABNEY: May I approach the witness, your Honor?

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Kaczmarek - cross

1 THE COURT: Yes, you may.

2 Q. Mr. Kaczmarek, I'm going to hand you a document which I
3 would ask you to review and satisfy yourself that it shows the
4 first column and the last column of the net unit sales document
5 portion of Costco Exhibit 233. Oh, I'm sorry. Your Honor
6 needs a copy.

7 THE COURT: Well, I have this notebook.

8 MR. DABNEY: I don't think this shortened version is
9 in the notebook.

10 THE COURT: All right. Thank you. So when referring
11 to a shortened version it's one column of the net sales unit?

12 MR. DABNEY: It is the first column which has the sign
13 text and the last column which has the grand total.

14 THE COURT: And all of that information appears on
15 233?

16 MR. DABNEY: Yes.

17 Q. So, Mr. Kaczmarek, are you able to verify that the grand
18 total column and the item signage column of what I'll call
19 Defendant's Exhibit 233A are the same as in the unit sales
20 column of Defendant's Exhibit 233?

21 A. I believe it's correct, yes.

22 THE COURT: And so are we admitting 233A as well?

23 MR. DABNEY: Yes.

24 THE COURT: Any objection?

25 MR. MITCHELL: No, your Honor.

G9LFTIF5

Kaczmarek - cross

1 THE COURT: 233A, an excerpt from 233, is admitted in
2 evidence.

3 (Defendant's Exhibit 233A received in evidence)

4 Q. So, Mr. Kaczmarek, if we could just then do some
5 comparisons, I'm going to put up on the document camera the
6 document your counsel asked you about, the summary of signage
7 data. I believe you said you prepared this in June of 2014, is
8 that right?

9 A. Right.

10 THE COURT: What document number is that?

11 MR. DABNEY: This is Plaintiff's Exhibit 133.

12 THE COURT: All right.

13 Q. So if we look here at this -- this is a summary of signage
14 record entries you found in that pile of books that was in
15 front of you earlier, right?

16 A. Correct.

17 Q. So you don't list what the item numbers are in the sign,
18 right?

19 A. I have not, no.

20 Q. And you don't show what the sales were of any of these
21 items here, do you?

22 A. No.

23 Q. And you had Costco 37765 both at the time you prepared this
24 document and at the time you testified this morning, didn't
25 you?

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Kaczmarek - cross

1 A. Yes.

2 Q. And you, if we look at these first two sign entries, I'm
3 going to put up next to that the first entry of the document
4 you relied on in your first expert report. Does it appear to
5 you that the signage there for 1 carat weight diamond round 1.0
6 in the first line is an item 140513?

7 A. The first column matches, yes.

8 Q. And then if what we do is we look at the actual sales
9 document and look and see what it shows, we see in the upper
10 left hand column, and the jury will have the actual documents
11 to look at, but I'll put it side by side, we have actual sales
12 entries of that item that show a very small number of positive
13 and negative and positive and negative sales on the list. Am I
14 right?

15 A. That's fair.

16 Q. And this indicates that during the period we're talking
17 about, there were no positive net sales of that item at all, is
18 that right?

19 A. Correct. We have --

20 Q. And that's what the sales document shows?

21 A. Negative five unit sales on a net basis.

22 Q. And have you -- so this is a -- do you have any other
23 Costco sales records that you were provided that would show
24 anything different than what is shown in the buyer list?

25 A. I was provided with a file that was a returns file which

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Kaczmarek - cross

1 Dr. Cornell viewed as being helpful to distinguish between a
2 voided sale and an actual return.

3 Q. Mr. Kaczmarek, I'd like to direct your attention back to
4 Dr. Cornell's report, which in addition to referring to Costco
5 37765 also refers to a document Costco 7159. Did plaintiff's
6 counsel ever provide you with document 7159?

7 A. Yes.

8 Q. Well, when did that happen, sir?

9 A. Again, I don't specifically recall the date. It was
10 certainly subject or after my first expert report.

11 Q. Do you know what's in 7159?

12 A. I don't recall specifically, no.

13 Q. Do you know if 7159 contains sales records from which the
14 buyer list was pulled, sir?

15 A. That could be, yes.

16 Q. Well, you know that to be true, don't you?

17 A. I didn't memorize the Bates stamps associated with each
18 file.

19 Q. So you were hired in about October of 2013 to work on this
20 case, is that right?

21 A. Yes, sometime in October of 2013.

22 Q. And one of the things you asked plaintiff's counsel for was
23 copies of Costco's sales records, isn't it?

24 A. I asked for any information that Costco had provided that
25 would assist in calculating Costco's profits.

G9LFTIF5

Kaczmarek - cross

1 Q. Well, you'd agree that sales records would be pretty
2 helpful in calculating profits on sales that rely on them,
3 wouldn't you?

4 A. Yes.

5 Q. Mr. Kaczmarek, do you have any -- did you ask -- let me --

6 MR. DABNEY: May I approach the witness, your Honor?

7 THE COURT: Yes, you may.

8 Q. I'd like to show you the witness -- I don't have another --

9 THE COURT: That's fine.

10 Q. Your Honor, may the record show that I've handed the
11 witness a document marked Defendant's Exhibit 822 and which I
12 showed to opposing counsel during the break and they say they
13 have no objection to it coming in evidence and we would offer
14 it in evidence.

15 THE COURT: Defendant's Exhibit 822 is admitted in
16 evidence.

17 (Defendant's Exhibit 822 received in evidence)

18 Q. So, Mr. Kaczmarek, I want to show you this letter of
19 August 16, 2013, which refers to Costco 7157 through Costco
20 7159. Do you see that?

21 A. I see that.

22 Q. Does this indicate to you that by August 16, 2013, two
23 months before you were hired, the plaintiff had been provided
24 with Costco's sales records in general, not just the buyer
25 list?

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Kaczmarek - cross

1 A. It would suggest that, but I've never seen this letter.

2 Q. Okay. So is the content of this letter consistent with
3 whatever answer you got from plaintiff's counsel in response to
4 your request for Costco's sales records in October of 2013?

5 A. I couldn't say. I don't know what form the information was
6 provided.

7 Q. Well, what form was it given to you? You said you got this
8 7159 document at some point, didn't you, Mr. Kaczmarek?

9 A. I did, yes.

10 Q. But you can't remember when?

11 A. I don't recall a specific date, no.

12 Q. And you didn't amend your report or anything after that?

13 A. I did. I issued a declaration with the alternative
14 calculation.

15 Q. Well, did you go back and check whether the summary
16 document figures were backed up by 7159, sir?

17 A. Backed up in what sense?

18 Q. Well, you had a summary of underlying sales records, didn't
19 you?

20 A. I did, yes.

21 Q. For nine specific items like 14513, didn't you?

22 A. Correct.

23 Q. And so if you wanted to, if you genuinely had doubts about
24 the numbers in the summary you relied on, Mr. Kaczmarek, you
25 had available to you the Costco sales records in 7159 that

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Kaczmarek - cross

1 would have allowed you to verify whether or not the sales for
2 that item, say negative 22,000 in sales, all returns of a
3 discontinued item were what was shown in the summary or not,
4 didn't you?

5 A. That's something that could have been performed, yes.

6 Q. Did you do that, sir?

7 A. I have not done that, no.

8 Q. Did you suggest maybe that would be a good thing to do?

9 A. I didn't think it was a good thing to do. I thought
10 instead to try to replicate Dr. Cornell's analysis was more
11 important.

12 Q. So are you saying now that in all the time you've had this
13 you haven't found any discrepancy between the net sales units
14 or the net sales dollars between the summary and the underlying
15 document 7159?

16 A. I haven't checked.

17 Q. Have you found discrepancy between the -- I'm sorry. Well,
18 Mr. Kaczmarek, if you haven't checked, for all you know the net
19 unit sales numbers in Costco Exhibit 133 are 100 percent
20 accurate?

21 A. It's possible. It's possible they're not accurate.

22 Q. Didn't you understand one of your jobs in this case was to
23 verify what the actual sales numbers were?

24 A. I don't think I could have ever verified what the actual
25 sales numbers were with the data I had.

G9LFTIF5

Kaczmarek - cross

1 Q. Well, but you said you didn't need to check it.

2 A. I didn't check whether the underlying detail matched this
3 summary specifically.

4 Q. Well, you also haven't produced any sales records out of
5 7159 either, have you?

6 A. I performed a calculation with that file, yes.

7 Q. I'm asking you, sir, have you presented in this courtroom
8 any sales numbers that you yourself pulled out of 7159?

9 A. Yes.

10 Q. You have?

11 A. Yes.

12 Q. So, okay, for item 140593 what sales numbers did you pull
13 out of 7159?

14 A. I didn't perform a calculation at an item level or signage
15 level.

16 Q. Well, don't you understand, sir, that there are various
17 signs in this case as to which the plaintiff is making no
18 claim?

19 A. Yes.

20 Q. So it's important, then, isn't it, to try to find out what
21 sales coincide in time with when signs existed?

22 A. I agree with you. That's very important.

23 Q. Okay. So if we could go to, still sticking with item
24 140513, just to use it as the sake of example, this is one for
25 which Dr. Cornell reported net sales of zero, is that right?

G9LFTIF5

Kaczmarek - cross

1 I'm looking at the first row of Defendant's Exhibit 233A.

2 A. It would help to answer the question to see his actual
3 chart in front of me to verify that it is zero.

4 Q. Well, Dr. -- strike that -- Mr. Kaczmarek, you have not
5 presented any evidence that the sales for that item were
6 greater than zero, have you?

7 A. I couldn't, because I can only work with the data Costco
8 has provided.

9 Q. Okay, well, let me get this straight, then. Your counsel
10 had the sales records from August of 2013. You accept that?

11 A. In some form it appears so.

12 Q. And your counsel didn't provide those to you at the time
13 that you provided your original expert report, right?

14 A. Yes.

15 Q. So we therefore have a situation where the information you
16 relied on in your first expert report was that for this item
17 there were no positive net sales during the statute of
18 limitations period.

19 A. Correct.

20 Q. That's what the documents show. And that's also consistent
21 with the 37765 document you say you also weren't given before
22 your expert report.

23 A. It may be. As I stated, I haven't checked on an
24 item-by-item basis these numbers.

25 Q. All right. So then we come to the next one, the item

G9LFTIF5

Kaczmarek - cross

1 378259. The summary document shows that the sales of that were
2 zero during the statute of limitations period, doesn't it?

3 A. Net sales of zero, yes.

4 Q. Did you check that one against the buyer list, sir?

5 A. No, I don't recall doing so.

6 Q. Did you check that against the underlying sales record
7 7159?

8 A. I don't recall doing so.

9 Q. So are you asking the jury to find that as to that item the
10 sales were greater than zero during the statute of limitations
11 period?

12 A. I can only report what the data says, but the data to me
13 indicates it's incomplete.

14 Q. What about -- let me put up Exhibit 52 again. We have an
15 item here 378259 which has one positive and one negative sale
16 that nets out to zero. Do you have any reason to believe,
17 Mr. Kaczmarek, that this set of line entries is not the Costco
18 sales of that item during the statute of limitations period?

19 A. No, I do not.

20 Q. Have you found in 7159 any different information for that
21 item?

22 A. No. 7159 contained only items apparently listed on the
23 summary spreadsheet.

24 Q. And you don't think this one was one of those items?

25 A. Yes, I believe that is one of the items.

G9LFTIF5

Kaczmarek - cross

1 Q. So are you saying for, if the buyer list says that the net
2 sales of that item were zero, are you asking the jury to find
3 that the sales were greater than zero?

4 A. I simply opine that I believe the information is incomplete
5 and that is not disagreed between myself and Dr. Cornell.

6 Q. So this information you say is incomplete, let's talk about
7 sales, then. The number of sales of this item. What number of
8 sales of this item do you think were made between 2007 and
9 2012, of this item 378259?

10 A. I'm uncertain.

11 Q. So you haven't ventured any opinion on that at all, have
12 you?

13 A. No.

14 Q. But you relied initially on a document that showed the net
15 sales were zero, didn't you?

16 A. Yes.

17 Q. And you thought it was reliable enough for you to put your
18 signature on an expert report that so stated, didn't you?

19 A. I said I was dissatisfied with the level of information,
20 but I went ahead and made a calculation nonetheless.

21 Q. And the information you wanted was information your counsel
22 had and didn't provide to you at that time, isn't it?

23 A. Again, I don't know what form they had the information;
24 hard copy or soft copy. I don't know.

25 Q. Would that have made a difference to you if they had an

G9LFTIF5

Kaczmarek - cross

1 electronic copy?

2 A. It would have certainly been easier to work with than a
3 hard copy where I would have needed to enter all the data again
4 before I analyzed it.

5 Q. Let's go back again to Plaintiff's Exhibit 822. Did
6 plaintiff's counsel ever tell you that they had a CD rom with
7 7159 on it?

8 A. You can copy a PDF file --

9 Q. Do you know what was on 7159, sir?

10 A. Sorry.

11 Q. Do you know if plaintiff's counsel was provided with an
12 electronic copy of 7159, sir?

13 A. At some point, yes.

14 Q. At some point? When do you think they got the electronic
15 copy?

16 A. I have no idea.

17 Q. Did you ever ask?

18 A. No, I did not.

19 Q. Would it have been consistent with their answers to
20 questions to you if they had an electronic copy of the sales
21 records and didn't give it to you in October of 2013?

22 A. I'm sorry, could you repeat the question?

23 Q. You said you asked for sales records from plaintiff's
24 counsel, didn't you?

25 A. I don't specifically recall asking for sales records but

G9LFTIF5

Kaczmarek - cross

1 asking for any information Costco has provided that would be
2 helpful in calculating profits.

3 Q. And they never provided you with any electronic copy of
4 7159 until sometime you don't remember after your expert
5 report, sir, right?

6 A. Correct.

7 Q. So let's go to the next one, shall we, 380068. This is the
8 dollar sales. Mr. Kaczmarek, this is another item that was the
9 subject of your initial expert report, wasn't it?

10 A. It was certainly listed in the spreadsheet, yes.

11 Q. And the spreadsheet for this item included time periods
12 that were before the statute of limitation period, didn't it?

13 A. Yes. I was unaware of any statute of limitations when I
14 prepared my first report.

15 Q. So in any of your work on this have you found sales records
16 that show a different net sales figure than what is shown here
17 for the periods covered in the spreadsheet for item 380068?

18 A. I can only calculate what was based on Costco's
19 disclosures.

20 Q. Then we go to the next one, which is 380177. 380177. Do
21 you understand, Mr. Kaczmarek, that sales of that item under
22 that sign text are out of the case?

23 A. It's possible.

24 Q. You don't understand that a sign that says "Tiffany style
25 ring" is out of the case, Mr. Kaczmarek?

G9LFTIF5

Kaczmarek - cross

1 A. It's possible. I didn't make any judgment call as to what
2 would be admitted and what would not be admitted.

3 Q. I'm just asking you now, as you understand it, in this
4 trial here, do you understand that a sign that says "Tiffany
5 style ring" is not the subject of a claim in this case?

6 A. Possibly, yes.

7 Q. Possibly? Are you asking the jury to find that some amount
8 of sales of a product that said "Tiffany style ring" on the
9 sign is the basis of a claim in this case?

10 A. I'm not asking them to do that at all. I think that's
11 based on the judge's instructions.

12 Q. Okay. Then we have the next one 384113. Did you check
13 that against any sales records?

14 A. Again, I didn't reconcile the sales records to this
15 particular spreadsheet.

16 Q. Let me draw your attention to the second page of
17 Defendant's Exhibit 52. We have 380177, that was the one we
18 just looked at. If I could put them side by side we have
19 380177 which shows negative net sales of 10,600 and then we
20 have the buyer list which shows about the same information,
21 don't we?

22 A. Certainly shows in sum a net figure, which as I testified
23 earlier can't possibly happen.

24 Q. It can't possibly happen. Do you know about the Costco
25 member satisfaction return policy, Mr. Kaczmarek?

G9LFTIF5

Kaczmarek - cross

1 A. I do.

2 Q. You address that in your expert report, didn't you?

3 A. I'm not sure if I specifically did.

4 Q. Well, you talked about return rates in your expert report,
5 didn't you?

6 A. I did.

7 Q. So what is to prevent Costco from receiving a return of a
8 discontinued item, Mr. Kaczmarek?

9 A. Nothing prevents them from accepting it. My point was
10 simply you have to have a purchase before you can have a
11 return.

12 Q. So the purchase could have been prior to 2007, couldn't it?

13 A. It's possible. I'd be speculating.

14 Q. I understand, but you are, you're saying that based on this
15 snapshot of information that if there's a showing of returns
16 but no corresponding sale, you're saying that it couldn't be
17 that the purchase was made before the period of time covered by
18 the records of that, is that your position?

19 A. It's possible. I don't have specific knowledge as to how
20 long Costco allows a buyer to acquire something and then return
21 it. This would be quite some time after the purchase was made,
22 then.

23 Q. Let's go on to 384113. This again, this is one where there
24 was no positive net sales according to Dr. Cornell and no
25 positive net sales according to the buyer list, right?

G9LFTIF5

Kaczmarek - cross

1 A. Yes.

2 Q. And then we go to 38114, that's the next one on the list.
3 Again, it shows no positive net sales and Dr. Cornell shows no
4 positive net sales. Fair to say?

5 A. That's fair, yes.

6 Q. And I understand you to say --

7 Now, another thing you mentioned in your expert report
8 was, you made a statement if I can find it here -- your expert
9 report, your first expert report was given, we've established,
10 in November of 2013, is that right?

11 A. November 2nd, 2013.

12 Q. And in that you reported on, among other things, what
13 Costco's sales of certain diamond ring items were.

14 A. Correct.

15 Q. And you did not have available to you at that time the
16 buyer list you said.

17 A. Correct.

18 Q. And you did not have available to you at that time the
19 sales records in Costco 7159 either.

20 A. Correct.

21 Q. And you therefore relied entirely on a summary that had
22 been provided of the underlying records, correct?

23 A. I presume it was prepared with underlying records. Whether
24 they were the same that were ultimately produced, I don't know.

25 Q. But in all the time since November 13 you have not come

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Kaczmarek - cross

1 forward with any discrepancy between the summary and the
2 underlying records you've had for more than two years, have
3 you?

4 A. I haven't done the analysis.

5 Q. Now, you understand that one of the tasks we're about here
6 is to get at the truth with respect to what the actual sales
7 were. Do you agree with that?

8 A. Quite fair.

9 Q. And yet even then your opinions in this case are not
10 grounded in any actual review by you of the Costco sales
11 records, are they?

12 A. I would disagree.

13 Q. Let me -- you mentioned in your testimony, in your report,
14 quote, "According to deposition testimony I have read,
15 approximately 11,000 letters were sent out to Costco members
16 who allegedly purchased Tiffany rings." Have I read that
17 correctly?

18 A. Sounds right. I don't have it in front of me.

19 Q. So when you filed your expert report you didn't have sales
20 records, but you provided an opinion that the amount of sales
21 could be based on some deposition testimony that 11,000 letters
22 were sent out.

23 A. That was an alternative calculation I provided, yes.

24 Q. And in any prior case, Mr. Kaczmarek, have you offered an
25 opinion with a reasonable degree of certainty for a publicly

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Kaczmarek - cross

1 traded company for sales records that you would say that the
2 number of sales of certain items could be based on a piece of
3 deposition testimony that you just referred to?

4 A. I don't recall.

5 Q. In fact, you have never done that; have you, Mr. Kaczmarek?

6 A. I don't recall.

7 Q. And let's look at, I want to put up --

8 MR. DABNEY: Can I approach the witness, your Honor?

9 THE COURT: Yes, you may, and you'll show Mr. Mitchell
10 what you --

11 MR. DABNEY: Yes.

12 Q. Mr. Schutt, I'm going to hand you --

13 MR. MITCHELL: Kaczmarek.

14 Q. Mr. Kaczmarek, I'm going to hand you two pages of
15 deposition testimony and I'm going to direct your attention to
16 pages 69 and 70 and I'm going to ask if that is the deposition
17 testimony that you based your alternative theory on.

18 A. I wouldn't characterize it as my alternative theory. It's
19 an alternative calculation.

20 Q. Well, Mr. Kaczmarek, one of the things that you said in
21 your report -- let's put it up first. This is some deposition
22 testimony of Mr. Douglas Schutt who is sitting at counsel's
23 table. I'd like to put up the questions and answers we've
24 heard so much about in this trial. In which he says:

25 "Q. Do you know how many of these letters were sent?

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Kaczmarek - cross

1 "A. I don't know the exact number.

2 Approximately.

3 I don't remember. I -- my recollection it was around
4 11,000 or so. I don't remember the exact number.

5 11,000.

6 I don't know for sure the exact number.

7 Who would know?

8 I would -- I would ask my legal team if they knew
9 first."

10 Is that the testimony you're relying on to say pay no
11 attention to the sales records, you should base the damages in
12 this case based on this 11,000 number.

13 A. That was not my testimony at all.

14 Q. Okay. So you said in your report, "I have not seen the
15 data used as a basis for the distribution of the letters nor
16 have I seen information that would assist me in reconciling the
17 different level of sales suggested by these letters and those
18 suggested by the summary level spreadsheet file provided by
19 Costco."

20 Do you recall making that statement?

21 A. Sounds about right.

22 Q. Did you ask plaintiff's counsel whether they had the
23 mailing list?

24 A. I asked again for anything that would assist me in
25 calculating profits.

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Kaczmarek - cross

1 Q. Well, we now know -- I'm going to put up on the screen
2 paragraph 7 of your expert report so we can see it here. It
3 says -- this is what I just read to you. "I have not seen the
4 data used as a basis for the distribution of letters nor have I
5 seen information that would assist me in reconciling the
6 different levels of sales suggested by those letters and those
7 suggested by the summary spreadsheet."

8 Did you ask for that information?

9 A. Again, I asked for anything that would be relevant to
10 performing my calculations of Costco profit.

11 Q. You're specifically asking about the mailing list, aren't
12 you, Mr. Kaczmarek?

13 A. Yes. Here I said I did not have that data. That's what I
14 testified to earlier.

15 Q. And did you know that the plaintiffs had the mailing list
16 at that time?

17 A. I don't know when they received the mailing list.

18 Q. I direct your attention to Exhibit 234 in your book.
19 Mr. Kaczmarek, I show you what's been marked as Defendant's
20 Exhibit 234. Have you ever seen this mailing list before?

21 A. I've seen it, yes.

22 Q. And when did you first see it?

23 A. It was after the preparation of my first report.

24 MR. DABNEY: Your Honor, we offer Defendant's 234 in
25 evidence.

G9LFTIF5

Kaczmarek - cross

1 THE COURT: Any objection?

2 MR. MITCHELL: No objection.

3 THE COURT: Defendant's Exhibit 234 is admitted in
4 evidence.

5 (Defendant's Exhibit 234 received in evidence)

6 MR. DABNEY: We have -- may I have a conference with
7 counsel, your Honor?

8 THE COURT: Yes.

9 (Pause)

10 THE COURT: If you would please walk further back and
11 turn your backs to the jury. Hey, jury. Thank you.

12 MR. DABNEY: While counsel is looking at that, if I
13 could hand up a copy for the Court?

14 THE COURT: Yes. Thank you.

15 MR. DABNEY: Your Honor, I understand from counsel
16 that there's no objection to the proffer in evidence of Costco
17 Trial Exhibit 825. I should have given the Court a copy of
18 825.

19 THE COURT: I'll just write 825 on this. So
20 Defendant's Exhibit 825 is admitted into evidence.

21 (Defendant's Exhibit 825 received in evidence)

22 Q. All right, Mr. Kaczmarek. I want to -- Mr. Kaczmarek, I'm
23 first going to put up on the screen Costco Trial Exhibit 234,
24 which is headed native file 37756. Is that what you have in
25 front of you?

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Kaczmarek - cross

1 A. Yes.

2 Q. And now I'm going to put up Costco Trial Exhibit 825 which
3 is a letter dated October 21, 2003, enclosing a copy of, among
4 other things, Costco 37756. Have I read that correctly?

5 A. Yes, I see that on the document.

6 Q. And then if we would go back -- so does this indicate to
7 you that this Costco 37756 document was provided to plaintiff's
8 counsel by October 21, 2013?

9 A. Yes, just a couple of weeks before I had to file my report.

10 Q. When were you first hired in this case?

11 A. It was in October. I don't recall the specific date.

12 Q. So you were hired at most three weeks before this letter?

13 A. At most, yes.

14 Q. And your report was filed about three weeks after this
15 letter, right?

16 A. It would have been 17 days.

17 Q. And then we look at the Exhibit 234 itself and what we have
18 is a list of names and addresses. Did plaintiff's counsel ever
19 explain to you what this was?

20 A. Yes. I understood it to be the basis of the data that
21 produced the letters that Costco sent.

22 Q. And so when do you recall this document first being
23 provided to you?

24 A. I don't recall a specific date, but it was obviously after
25 I issued my first report.

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Kaczmarek - cross

1 Q. All right. So are you telling us, sir, that you wrote a
2 report that says "I have not seen the data used as a basis of
3 the report," you're putting that out there and yet your counsel
4 is sitting there with the data that's the basis of the report.
5 Is that what you understand to be the case now?

6 A. Again, I don't know what form the data was delivered.

7 Q. Okay. And so did you provide a draft of this report to
8 plaintiff's counsel before it was filed?

9 MR. MITCHELL: Objection, your Honor.

10 THE COURT: Consult, please.

11 (Pause)

12 Q. At any time, Mr. Kaczmarek, was this statement of yours
13 called out to you as maybe being not accurate by plaintiff's
14 counsel?

15 MR. MITCHELL: Same objection.

16 MR. DABNEY: Withdrawn.

17 Q. So at some point did you learn, Mr. Kaczmarek, that the
18 11,000 figure that you repeated as late as today, it was
19 contradicted by the mail list Costco Trial Exhibit 234?

20 A. Obviously the sales totals and the buyer file are less. So
21 when I looked at it I could see it was less but I don't believe
22 Dr. Cornell was relying on that particular list to do any
23 calculations.

24 Q. I want to find out from you, sir, you're saying -- in what
25 year did you first receive this mailing list?

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Kaczmarek - cross

1 A. It likely was the end of 2013.

2 Q. So you knew by not later than the end of 2013 that Mr.
3 Schutt's testimony that he couldn't remember was inaccurate.

4 A. Well, it could be that we're missing data as well. I can't
5 rule that possibility out.

6 Q. Okay. So you distrust the mail list, is that what you're
7 saying?

8 A. What I'm saying is there's a large discrepancy between the
9 two.

10 Q. And what you said in your report was, "I haven't seen the
11 data that was used to generate the mail list."

12 A. Correct. That's a caveat telling the reader I don't have
13 underlying data to support this.

14 Q. But now that you have the data and you're a professional,
15 you're saying that as between the mail list that's in front of
16 you and the deposition testimony in which you said about four
17 times "I don't remember and don't know the exact number," which
18 of the two letter numbers do you think is the more relevant?

19 A. I don't have an opinion one way or the other. I've
20 provided calculations for both.

21 THE COURT: Mr. Dabney, if you would find a place
22 within the next ten minutes to stop for a break, I'd be
23 grateful.

24 MR. DABNEY: Thank you, your Honor. Yes.

25 Q. In fact, the number of names on the buyer list, Defendant's

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Kaczmarek - cross

1 Exhibit 52, matches up with the number of names in the mailing
2 list, Defendant's Exhibit 234, doesn't it?

3 A. It may. I don't recall.

4 (Continued next page)

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Kaczmarek - cross

1 MR. DABNEY: Your Honor, I'm happy to take a break
2 now, if this is an OK time to do it?

3 THE COURT: Very well.

4 So, ladies and gentlemen, we'll take our afternoon
5 break. Please be ready in the jury room at ten past 3.

6 (Recess)

7 BY MR. DABNEY:

8 Q. Good afternoon, Mr. Kaczmarek.

9 A. Good afternoon.

10 Q. During your direct -- I would like to direct your attention
11 back to Defendant's Trial Exhibit 139, which is, I believe, in
12 your book, which is in evidence, and I'm going to put it up on
13 the screen.

14 Mr. Kaczmarek, I direct your attention to the upper
15 left-hand part of this exhibit. Do you see where I'm referring
16 to?

17 A. I do.

18 Q. As I understand it, after your expert report was submitted
19 in this case, you got ahold of a copy of Exhibit 4 to
20 Dr. Cornell's report; is that right?

21 A. Correct. He issued a report following my report.

22 Q. All right. And what he did is, he went through, based on,
23 among other things, the buyer list 37765, and the underlying
24 sales record, 7159, he did an analysis of what the sales were
25 of the nine items that are listed in this chart. That was your

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Kaczmarek - cross

1 understanding?

2 A. And more. He relies upon this particular --

3 Q. Defendant's Exhibit 258.

4 A. 258, yes. Because the sales records don't have any signage
5 in them at all.

6 Q. All right. So if we go to this first item, 639911, you
7 understand that that's one of the four items for which
8 Dr. Cornell reported positive net unit sales in this case?

9 A. That's one of them, yes.

10 Q. And in your analysis, what you did is, you took
11 Dr. Cornell's analysis, and then you adjusted your previous
12 analysis so that the total number of units was adjusted to be
13 the same as the total number of units that Dr. Cornell had
14 arrived at. Is that right?

15 A. I wouldn't say that's precisely right. We tried to
16 replicate what Dr. Cornell did. We couldn't replicate it. We
17 got a different figure, net sales of just over 11 million,
18 which I put in my affidavit. And then I also just provided a
19 profit calculation, assuming his figures were right.

20 Q. So, Dr. Kaczmarek, Mr. Kaczmarek, you understand that one
21 of the issues we have to decide is what sales occurred at a
22 time when the word "set" or "setting" was omitted from the
23 639911 signage. Is that right?

24 A. I understand that may be the case, yes.

25 Q. And Dr. Cornell's report indicates that the first time when

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Kaczmarek - cross

1 the words "set" or "setting" was dropped from the 639911
2 signage was Costco fiscal period, year and period 2012/6.
3 Isn't that what he indicates here?

4 A. He does indicate that. How he determined that I have no
5 idea.

6 Q. Well, you determined the same thing, did you?

7 A. No, I did not.

8 Q. You didn't.

9 A. I used signage files and came up with ranges with the
10 signage files. Dr. Cornell doesn't use that signage file.

11 Q. You don't think Dr. Cornell looked at signage files.

12 A. He may have looked at them, but the source of the date
13 ranges here, I understand, correspond to 258.

14 Q. So if we could look at your exhibit that your counsel
15 showed you, which was Plaintiff's Exhibit 33, you show a series
16 of signs down at the bottom of your chart, which I'm going to
17 put up here --

18 MR. MITCHELL: 130?

19 MR. DABNEY: 133, Plaintiff's 133.

20 Q. And what we have here according to your analysis is, we
21 have a sign that says "platinum Tiffany .70 CT VS2 I round,
22 diamond ring." And you would agree with me that that text
23 corresponds with the signage that Dr. Cornell first refers to
24 as having started in 2012/6? Do you agree with that?

25 A. The signs match, yes.

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Kaczmarek - cross

1 Q. And then according to your chart, you first refer to that
2 signage as starting in 2012-2013, don't you?

3 A. It occurred between 2012 and 2013, yes.

4 Q. So your own analysis confirms that that particular sign did
5 not exist prior to 2012.

6 A. That's what the data shows, yes.

7 Q. Your own analysis of the data.

8 A. My analysis of the data, but the data is not mine.

9 Q. OK. So insofar as you and Dr. Cornell have addressed this
10 subject, both of you say there is no evidence that that sign
11 existed in 2007, 2008, 2009, 2010, or 2011, do you?

12 A. Based on the evidence I've seen, I have no reason to
13 conclude that.

14 Q. So based on that, if that's right, then with regard to item
15 639911, we can cross off the first row, the second row, and the
16 third row, as you understand the rules of the game. All right,
17 Mr. Kaczmarek?

18 A. That's for the jury to decide. That's not for me to
19 decide.

20 Q. But as you understand it, if a sign said "Tiffany setting"
21 or "Tiffany set," the award should be zero. Correct?

22 A. If it does. I don't have confidence that the signs are
23 necessarily correct because I don't know how that was com --
24 that information was compiled.

25 Q. The data you looked at showed that this particular sign

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Kaczmarek - cross

1 didn't exist prior to 2012? True or false.

2 A. In the signage data it did not exist.

3 Q. And then you commented on this further sign that has the
4 word "Tiffany" removed. Do you understand that the signage
5 records here were all produced as of the last day of the fiscal
6 year and periods in question?

7 A. I don't know if they're produced as of the last day or not.
8 I don't recall. They summarize it by fiscal year and fiscal
9 period.

10 Q. All right. So if a sign changed in the middle of a fiscal
11 period, the sign text earlier in the period might not show up
12 as of the last day of the fiscal period, would it?

13 A. It's possible. I don't have all the details as to how
14 those records are kept and created.

15 Q. Then if we go to 637277, this is the one where there's a
16 distinction between a sign where "Tiffany set," the word
17 "Tiffany" and "set" are together but on different lines. Do
18 you understand that to be the case?

19 A. I can see that, yes.

20 Q. And you found signs with that pattern too, didn't you?

21 A. Yes.

22 Q. And you understand that one of the things that needs to be
23 decided in this case is whether "Tiffany set," where "Tiffany"
24 is on one line and "set" is a different line, is supposed to
25 mean something different than when "Tiffany set" is on one

1 line.

2 A. Yes. I understand there is some tension between the
3 parties on that.

4 Q. So if it's concluded that "Tiffany set," where "set" was on
5 the second line, was intended to be a combined term, "Tiffany
6 set," as you understand the rules of the game here, those
7 should not be included in any monetary award. Correct?

8 A. Again, if it's determined that that indeed was actually the
9 sign next to the ring when it was sold.

10 Q. So then we could strike those off.

11 And then we have the items at the bottom where the net
12 sales according to Dr. Cornell are zero. Let's read those out.
13 That's 384114, 384113, 380177, 378259, 140513. Dr. Cornell's
14 analysis was the net sales of those were zero during the
15 relevant period. Is that right?

16 A. That's what he concluded, yes.

17 Q. And you have not provided any contrary sales data, have
18 you?

19 A. By signage, no, because I don't understand how the signs
20 were assigned to the sales records. There isn't signs in the
21 sales records.

22 Q. Well, we're talking about items with zero net sales
23 according to the sales data. You understand that.

24 A. For that particular item, yes.

25 Q. All right. So you're not aware of any data that shows that

G9LATIF6ps

Kaczmarek - cross

1 sales of item 384114 were greater than zero during the statute
2 of limitations period, are you?

3 A. I can only do calculations based upon data given to me.
4 But I have some doubts as to whether the data is complete.

5 Q. So if these are all zero according to Dr. Cornell, these
6 can all be crossed out.

7 So then that leaves us with a subset of the items in
8 which the word "setting" or "set" was dropped off the signs.
9 And then we have to figure out what the rate of profit was on
10 those items. Would you agree with me there?

11 A. Yes. We have to determine the profit rate, I agree.

12 Q. Among the documents that were provided to you,
13 Dr. Kaczmarek, were Costco's records of cost of goods sold. Is
14 that right?

15 A. I would disagree with that characterization. They are
16 purchase orders showing landed cost. Cost of goods sold is a
17 different type of calculation using goods acquired.

18 Q. Let me show you a copy of your -- the list of the documents
19 you considered in this case. If I could put up here --

20 THE COURT: This is which exhibit number?

21 MR. DABNEY: This is Plaintiff's Exhibit 141.

22 THE COURT: Thank you.

23 MR. DABNEY: In evidence.

24 Q. So as I understand it, Mr. Kaczmarek, when you rendered
25 your opinions in this case, among other things you relied on

G9LATIF6ps

Kaczmarek - cross

1 was Costco 37754, which we looked at earlier as Defendant's
2 Exhibit 233. Correct?

3 The big spreadsheet.

4 A. Yes, the big spreadsheet.

5 Q. It's been marked as two things. 258 is the unit sales and
6 233 is a big, complete copy with units and dollar sales.

7 A. OK.

8 Q. And then you refer to Costco Department 35 purchase order
9 data, Costco 37753.

10 A. Yes.

11 Q. You did not rely on that data in forming your profit rate
12 calculation, did you?

13 A. That's correct, for the reasons I've already explained.

14 Q. So what you did instead was to rely on deposition testimony
15 again about what Costco's profit rate in general was on items.
16 Is that right?

17 A. Not in general on items but specifically on jewelry.

18 Q. Do you think the deposition testimony was specific as to
19 jewelry?

20 A. I believe so.

21 Q. But the records would show what it was.

22 And one of the things you said you relied on was
23 Costco vendor quote sheets. Isn't that so?

24 A. Those were documents that we did receive a day before I had
25 to issue the report. We looked at some but could not

G9LATIF6ps

Kaczmarek - cross

1 incorporate them into our analysis in a single day.

2 Q. Well, Mr. Kaczmarek, if I could direct your attention back
3 to 141 again, one of the things you say you considered in
4 providing your report was Costco document 1432. That was a
5 document you considered, wasn't it?

6 A. Yes. It was provided to me. But I specifically indicated
7 in my report that I did not have sufficient time to analyze all
8 of the vendor quote sheets.

9 Q. Did you look at them?

10 A. Yes.

11 Q. So I would like to direct your attention to Defendant's
12 Exhibit 27 and ask you if that is one of the documents that you
13 looked at in your report.

14 A. Yes. That appears to be one of the quote sheets.

15 MR. DABNEY: Your Honor, we offer Defendant's Exhibit
16 27 in evidence.

17 THE COURT: Any objection?

18 MR. MITCHELL: No, your Honor.

19 THE COURT: Defendant's Exhibit 27 is admitted in
20 evidence and may be displayed.

21 (Defendant's Exhibit 27 received in evidence)

22 Q. So, Mr. Kaczmarek, this document is called a Costco vendor
23 quote sheet, from R. B. Diamond Inc. You see where I'm
24 referring to?

25 A. Yes.

G9LATIF6ps

Kaczmarek - redirect

1 Q. Did anyone explain to you what the Costco vendor quote
2 sheet information is?

3 A. I presumed it was a quote from a vendor to possibly supply
4 Costco with diamond rings.

5 Q. And this had in it an item description and it had in it an
6 image of the item being supplied; is that right?

7 A. Yes. It does have the description, which the sales files
8 never contained.

9 Q. And then down in the lower left, there is some handwritten
10 notation which talks about Costco's cost, Costco's sell, IMU,
11 cost, IMU, WAC. Did you pay any attention to that information
12 in those handwritten notes?

13 A. No, I did not.

14 Q. Do you know what "IMU" stands for in Costco parlance?

15 A. I don't. I would assume it's some internal markup.

16 Q. And analyzing what Costco's actual profits were on items
17 including item 639911, of which this is an example, you did not
18 take account of the cost data in these quote sheets, did you?

19 A. Correct, because they're not actual transactions. This is
20 just a quotation.

21 MR. DABNEY: Nothing further, your Honor.

22 THE COURT: Mr. Mitchell.

23 REDIRECT EXAMINATION

24 BY MR. MITCHELL:

25 Q. Two things, Mr. Kaczmarek. Mr. Dabney was a little quick

G9LATIF6ps

Kaczmarek - redirect

1 with the pen here. I've highlighted here from -- what's the
2 number of the Defendant's exhibit?

3 MR. DABNEY: 139.

4 Q. 139. Mr. Dabney just crossed out this particular entry,
5 where "Tiffany" and "set" are not on the same line. Do you see
6 that?

7 A. Yes.

8 Q. We're aware that that's for the jury to decide whether
9 that's included or excluded; it doesn't get automatically
10 crossed out. You understand that?

11 A. Absolutely it's for the jury to decide on any of these
12 sales items what's included or not included.

13 Q. And the other entry we had corrected on the bottom, as you
14 recall. The signage data had showed that the sign for item
15 140513, which, Mr. Dabney showed you a very small sampling of
16 purchases and returns that had a negative number. Your review
17 of the signage data showed that this signage was visible in the
18 Costco records from 2007 to 2013, correct?

19 A. Correct.

20 Q. And if I understood you correctly, you questioned the
21 completeness of the report of sales for that item number given
22 the fact that the signage records persisted in the Costco
23 records for a period of six years. Correct?

24 A. That's correct. And I believe that particular item we have
25 no purchase data for either.

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Kaczmarek - recross

1 Q. And it is not disputed in this case that the wording of
2 that sign, "solitaire Tiffany," would be included for the
3 recovery of damages if there were sales reported for that.

4 A. That's my understanding, yes.

5 MR. MITCHELL: Nothing further. Thank you.

6 THE COURT: Anything further, Mr. Dabney?

7 MR. DABNEY: Yes, just for clarity of the record.

8 RECROSS EXAMINATION

9 BY MR. DABNEY:

10 Q. If I could put back up 139 that we were looking at before,
11 I should have probably put a question mark here because, unlike
12 the first three items, this is the one, the 637277, where
13 "Tiffany" and "set" are together but on two different lines.
14 That is in a different category than the ones in the first
15 three at the top, as you understand. Right?

16 A. It may be.

17 Q. Well, as you understand the rules of the game here, if
18 "Tiffany" and "set" on a sign was on a single line, then there
19 is no claim.

20 A. Again, that's for the jury to decide. It's not for me to
21 decide.

22 Q. I'm asking what you understand the rule is, sir. "Tiffany
23 set" on one line, there's no claim. You understand that.

24 A. Yes.

25 Q. "Tiffany setting" on one line --

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Schutt - direct

1 THE COURT: Mr. Dabney, is this witness qualified as
2 an expert in what the Court's rules are?

3 You've got plenty of time to make your arguments at
4 the appropriate time for argument.

5 MR. DABNEY: Nothing further, your Honor.

6 THE COURT: Thank you.

7 Thank you, Mr. Kaczmarek. You may step down. Your
8 testimony is concluded.

9 THE WITNESS: Thank you.

10 (Witness excused)

11 THE COURT: And someone will need to tidy the witness
12 stand as the next witness is ready to come to the stand. Who
13 will the next witness be, Mr. Dabney?

14 MR. MITCHELL: Mr. Mitchell, please.

15 THE COURT: Mr. Mitchell.

16 MR. MITCHELL: Douglas Schutt.

17 THE COURT: Mr. Schutt, would you please come to the
18 witness stand. I apologize to Mr. Mitchell and Mr. Dabney for
19 mixing up the names.

20 Please come to the witness stand, step up, and remain
21 standing to take the oath.

22 DOUGLAS WAYNE SCHUTT,

23 called as a witness by the plaintiff,

24 having been duly sworn, testified as follows:

25 THE COURT: Thank you, Mr. Schutt. You may be seated.

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Schutt - direct

1 DIRECT EXAMINATION

2 BY MR. MITCHELL:

3 Q. Good afternoon, Mr. Schutt.

4 A. Good afternoon.

5 Q. Could you please briefly give your background at Costco.

6 A. Sure. I actually was hired in 1985 as a buyer at the Price
7 Club, and was promoted two years after that to an assistant
8 general merchandise manager and then to a vice president of
9 hard lines at Price Club in 1989.

10 In 1992, we consolidated our East Coast and West Coast
11 buying offices with Price Club and I was transferred to San
12 Diego as a vice president for half the non-foods business at
13 Price Club.

14 In 1993, we merged, "we" being Price Club, merged with
15 Costco, and I was transferred up to Seattle, Washington, and
16 got promoted to senior vice president over non-foods
17 merchandising. I was in that position until 2000, as a senior
18 vice president over non-foods merchandising. I left the
19 company briefly. I came back six or seven months later as a
20 senior vice president in charge of our e-commerce business, a
21 new furniture business we had created, special-order kiosk, and
22 business delivery.

23 In 2004, I was promoted to executive vice president,
24 chief operating officer for the northern division for Costco,
25 which included the Midwest region, the Northwest region, and

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Schutt - direct

1 the Bay Area region.

2 In 2010 I was promoted to executive vice president and
3 COO of all merchandising at Costco, a position I held until
4 just recently.

5 THE COURT: Mr. Schutt, would you mind just speaking a
6 little closer to the microphone.

7 THE WITNESS: Oh, sure.

8 THE COURT: Thank you.

9 Q. Did I understand you to say the end position you held until
10 just recently?

11 A. Yes.

12 Q. What happened recently?

13 A. At the end of May, I, I stepped down from full-time work at
14 Costco, announced my retirement. I am still an employee of
15 Costco until the end of December and I'm in a consulting role,
16 helping out with the transition with the new individual who has
17 taken my position.

18 Q. During the period of time that is relevant to this case,
19 you were the executive vice president and chief operating
20 officer of merchandising for Costco, correct?

21 A. Yes.

22 Q. And that's a global position?

23 A. It's a position that is responsible for the direct
24 purchasing for all buying in the United States, both for inline
25 and online, and also I would be involved with global

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Schutt - direct

1 negotiations on behalf of the whole company, which would
2 include our international divisions potentially.

3 Q. Mr. Schutt, I would like to move this along. Please listen
4 to my questions because if I ask you a question that can be
5 answered yes or no, I would appreciate that. Mr. Dabney is
6 certainly capable of coming up and asking you questions
7 afterwards. I just asked you whether it was a global position.
8 The answer is yes, correct?

9 A. It required a yes-and-no answer, I believe, but --

10 Q. You had responsibility for every Costco store around the
11 world for merchandising, correct?

12 A. No.

13 Q. Where did you not have responsibility for merchandising?

14 A. I didn't have the direct responsibility for purchasing in
15 Canada, the U.K., Japan, Taiwan, Korea, Australia, Spain.

16 Q. So you had certainly direct responsibility for all of the
17 United States.

18 A. Yes.

19 Q. And all of the rings that are at issue in this case are
20 rings that were sold in the United States, correct?

21 A. Yes.

22 Q. So you were the person, the senior, most senior
23 merchandising person at Costco responsible for the area of
24 merchandising that would have included the rings that are
25 involved in this case, right?

G9LATIF6ps

Schutt - direct

1 A. Yes.

2 Q. To whom did you directly report in the chain of command?

3 A. I directly reported to Craig Jelenik.

4 Q. And Craig Jelenik is the president and CEO of Costco,
5 correct?

6 A. He is.

7 Q. And that makes one of the most senior executives in Costco;
8 is that fair, or made you one of the most senior?

9 A. That's fair.

10 Q. And you were in the position of being a direct report to
11 the president and CEO of Costco since at least 2010, right?

12 A. Yes.

13 Q. How many stores does Costco currently have?

14 Did they not break it down in the United States and
15 then outside the United States?

16 A. Break it down between -- I don't think I remember all of
17 those. But I think we have roughly 700-some locations
18 worldwide.

19 Q. Approximately how many employees, part time and full time?

20 A. It's over 200,000.

21 Q. And your experience at Costco is, you rose from -- you rose
22 through the ranks to become the top merchandising person in the
23 company, at least as it related to United States sales,
24 correct?

25 A. Yes.

G9LATIF6ps

Schutt - direct

1 Q. Is it fair to say that Costco, during your time there, has
2 grown to become the second-largest retailer in the United
3 States?

4 A. Yes.

5 Q. And Costco has revenues of at least \$100 billion a year,
6 correct?

7 A. Yes.

8 MR. MITCHELL: Your Honor, I would like to hand the
9 witness a witness book.

10 THE COURT: Yes, you may.

11 MR. MITCHELL: Thank you.

12 Q. If you would in the witness book please open that and turn
13 to page PTX 14. Would you have a look at that. This is a
14 redacted copy. The financial statements at the end are
15 unredacted. But this is Costco's annual report for 2012. Can
16 you confirm that this is the annual report for 2012?

17 A. Yes, it is.

18 MR. MITCHELL: We offer Plaintiff's Exhibit 14 in
19 evidence.

20 MR. DABNEY: Your Honor, this document has not been
21 redacted as required, so, subject to the proper redaction, we
22 would not oppose the proffer.

23 THE COURT: The exhibit is admitted subject to the
24 redactions that were earlier ordered.

25 (Plaintiff's Exhibit 14 received in evidence)

1 MR. MITCHELL: We will not take time over -- I'm not
2 going to refer to anything in there now in this, but -- I think
3 it was redacted but I don't need to take up time with the jury.

4 Q. Mr. Schutt, can you please turn to the page, or to the
5 exhibit marked PTX 17. I ask again, could you confirm that
6 this is Costco's annual report for 2015.

7 A. It is.

8 MR. MITCHELL: Subject to the same objection, we would
9 offer PTX 17 in evidence, and we can talk about it afterwards.

10 THE COURT: PTX 17 is admitted subject to compliance
11 with the earlier order.

12 (Plaintiff's Exhibit 17 received in evidence)

13 Q. Is it fair to say that, while you were in your position as
14 global -- or as executive vice president, chief operating
15 officer of merchandising, that you were the most important
16 merchandising person in all of Costco?

17 A. Correct.

18 Q. And does that include all merchandise, no matter what
19 category?

20 A. It does not include products that are in our ancillary
21 businesses.

22 Q. But if you're talking about the Costco warehouse that most
23 people know, the building, the Costco warehouse, were the most
24 senior person responsible for everything that was in that
25 building?

G9LATIF6ps

Schutt - direct

1 A. I can clarify that for you, or for the jury.

2 Q. OK.

3 A. So I would not have been responsible for our optical
4 business, you know, our contact lenses, our eyeglasses that we
5 sell. I would not be responsible for hearing aids, for
6 example.

7 Q. Anything else?

8 A. I was not responsible for gasoline sales. Photo, one-hour
9 photo, I was not responsible for that either.

10 THE COURT: I would ask you that you both keep your
11 voices up a bit and particularly Mr. Schutt, that you speak in
12 proximity to the microphone.

13 THE WITNESS: Speak louder, your Honor?

14 THE COURT: Can you just project a little bit more.

15 MR. MITCHELL: I apologize.

16 THE WITNESS: I'll speak up.

17 THE COURT: Thank you.

18 Q. Mr. Schutt, you've been here the entire trial so far,
19 correct?

20 A. Yes.

21 Q. And you were here for Mr. Dabney's opening statement; is
22 that right?

23 A. Yes.

24 Q. You were also here for the testimony of Brittni Popp and
25 Jean LaBarbera, correct?

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Schutt - direct

1 A. Yes.

2 Q. So you were in the courtroom when the signs that were
3 observed by Ms. Popp on November 27 and November 30, 2012 were
4 displayed in the courtroom, right?

5 A. Yes.

6 Q. So you saw that those signs said "Tiffany" as a standalone
7 to describe the rings that were on sale in the Huntington
8 Beach, California store on that day, right?

9 A. Could we take another look at that sign just so I recall
10 exactly what that showed?

11 MR. MITCHELL: Mr. Cole, I think it's 25.

12 Q. Remember that one?

13 A. Yes.

14 Q. OK. And I think 26 is the other sign.

15 You saw those photos when they were displayed in the
16 courtroom, correct?

17 A. Yes.

18 Q. And did you also hear Ms. LaBarbera testify that it was her
19 practice to call the rings "Tiffany" when she spoke with
20 customers about them?

21 A. Yes.

22 Q. And did you also hear Ms. Popp testify that she and
23 Ms. LaBarbera engaged in a conversation about the rings in
24 those photographs and refer to them as "Tiffany"?

25 A. OK.

G9LATIF6ps

Schutt - direct

1 Q. You heard that, right?

2 A. Yes.

3 Q. Did you find that troublesome?

4 A. No.

5 Q. Did you hear the testimony of Ms. LaBarbera that she was
6 confronted by an irate customer, Costco customer, who thought
7 that a ring of a Tiffany sign in a Costco display case in
8 Huntington Beach was a real Tiffany ring?

9 A. Yes.

10 Q. Did that bother you?

11 A. Sure.

12 Q. Did you hear that she took that complaint to her manager?

13 A. Yeah.

14 Q. So -- and a manager, I assume, at Costco is someone that is
15 part of the management structure at Costco; is that fair?

16 A. That's fair.

17 Q. So a floor person went to a manager at a Costco store in
18 Huntington Beach, California and reported to the manager that
19 there was an irate customer who was misled by signage in that
20 store, and nothing happened about it. Does that bother you?

21 MR. DABNEY: Your Honor, we have an objection.

22 THE COURT: Please consult.

23 (Counsel confer)

24 THE COURT: Please stand a little closer together and
25 don't talk quite so loud.

G9LATIF6ps

Schutt - direct

1 (Counsel confer)

2 MR. DABNEY: Um --

3 THE COURT: Are you requesting a sidebar?

4 MR. DABNEY: Yes, your Honor.

5 (At the sidebar)

6 MR. DABNEY: I believe the question mischaracterizes
7 the testimony previously given and calls for -- it assumes a
8 state of mind on behalf of this customer, which there is
9 absolutely no foundation for in the question. So I think the
10 question is objectionable.

11 THE COURT: Would you just reread the question to me,
12 please.

13 (Record read)

14 THE COURT: The objection to the form of the question
15 is sustained.

16 MR. MITCHELL: Could I rephrase?

17 THE COURT: Yes.

18 MR. MITCHELL: Thank you.

19 (Continued on next page)
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21
22
23
24
25

1 (In open court; jury present)

2 Q. Mr. Schutt, do you dispute that Ms. LaBarbera was
3 confronted by an upset customer who had come to her and asked
4 whether the ring in the display case at the Huntington Beach
5 store where the sign said "Tiffany" came with a blue box?

6 A. Yes.

7 Q. You dispute that.

8 A. I don't dispute that. I do not dispute that.

9 Q. You do not dispute that.

10 A. Yes.

11 Q. And do you recall her testimony; I think she said "he
12 almost came over the counter at me," right? Remember that?

13 A. I do.

14 Q. And she became startled by the reaction, right?

15 A. She sure did.

16 Q. OK. So is it fair that the conclusion can be drawn from
17 what Ms. LaBarbera said, somebody like you listening to it,
18 that there was a Costco customer looking at the sign in the
19 display case at the Huntington Beach store that interpreted
20 that sign as offering for sale a real Tiffany ring?

21 MR. DABNEY: We have an objection.

22 THE COURT: Is it -- speak to Mr. Mitchell.

23 (Counsel confer)

24 Q. You seemed as if you're a merchandising person who's been
25 in merchandising almost your entire life, right?

G9LATIF6ps

Schutt - direct

1 A. Yes.

2 Q. I am sure over the years -- maybe I'm wrong, tell me if I'm
3 wrong -- but you must have heard of some complaints sometimes
4 that filtered their way up to you from customers. Is that
5 fair?

6 A. It's fair.

7 Q. So what Ms. LaBarbera was testifying about was a Costco
8 customer -- right?

9 A. Yes.

10 Q. And she was expressing in this courtroom that she had been
11 startled by that customer, who wanted a blue box with the ring
12 that was in the case, right?

13 A. Yes.

14 Q. So as a merchandising person your entire life, listening to
15 that in the chair right over here, did you at least conclude
16 yourself that this customer must have thought that what that
17 customer saw in the case was a Tiffany ring? Did you conclude
18 that?

19 MR. DABNEY: Objection.

20 THE COURT: Overruled.

21 A. No.

22 Q. So you think the customer was asking if it came with a blue
23 box because that customer thought it was a Costco ring. Is
24 that your assumption?

25 A. I, I wasn't -- I don't know.

G9LATIF6ps

Schutt - direct

1 Q. And you heard Ms. LaBarbera say she took the complaint to
2 her manager, correct?

3 A. Yes.

4 Q. Informed her manager about what had happened. Right?

5 A. Yes.

6 Q. And that never filtered its way up to you in your
7 merchandising position at Costco. Right?

8 A. No.

9 Q. So whatever your training was of your managers in your
10 Costco stores, nobody thought enough to report this up the
11 chain of command that we have a customer in the store upset
12 looking at this sign, that they're not getting a blue box with
13 their ring. Is that fair?

14 A. OK.

15 Q. Yes?

16 A. Yes.

17 Q. OK. Now, I want to go back to Mr. Dabney's opening and
18 read you something he said to the jury. He said, quote, this
19 is management failure, Costco accepts this, and Costco has
20 acted to fix it. It is no longer the case that a sign can go
21 out on the floor without it being reviewed by someone higher up
22 in management than it was at the time. Did you hear that
23 statement?

24 A. Yes.

25 Q. Did you approve of that statement?

G9LATIF6ps

Schutt - direct

1 A. Yes.

2 Q. Was that an accurate statement?

3 A. Yes.

4 Q. OK. So my first question to you is, are you the one who's
5 responsible for this failure in management as the top
6 merchandising person at Costco?

7 A. It happened under my watch. I take full responsibility for
8 the sign management failure.

9 Q. Are you taking responsibility like Harry Truman that the
10 buck stops here, or are you taking personal responsibility
11 because you didn't do something?

12 A. I'm taking responsibility.

13 Q. Personally.

14 A. Yes.

15 Q. OK. What should you have done?

16 A. Could you ask that -- I'm not clear on that question.

17 Q. OK. We know about Ms. LaBarbera's recounting of a story
18 about a customer who climbed over the counter at her, over the
19 signage, right?

20 A. Yes.

21 Q. You've heard that. You know that Tiffany was certainly
22 upset about that signage. Right?

23 A. Yes.

24 Q. So listening to Mr. Dabney, I presume you would now agree
25 that Tiffany was right to be upset about that signage. Right?

G9LATIF6ps

Schutt - direct

1 A. I think, I think that requires a yes-and-no answer. Would
2 you like me to explain?

3 Q. It requires a yes-or-no answer. Do you think Tiffany was
4 right to be upset --

5 A. Excuse me. I'm sorry. I think that question requires a
6 yes *and* a no answer. Can I explain?

7 Q. No. The answer is, you can't say -- you can say that your
8 customer had a right to be upset, but Tiffany did not. That's
9 what your -- because you can't say yes for Tiffany, you can
10 only say for the customer.

11 A. No.

12 Q. That's not true.

13 A. Could -- you know, I'm not clear on your question now.
14 You've asked it several different times. If you could be so
15 kind to ask it one more time for me, make it clear for me.

16 Q. Mr. Schutt, Mr. Dabney made a point to this jury in his
17 opening that there was a management failure at Costco,
18 obviously as related to this case. Right?

19 A. Sign maintenance management area.

20 Q. Well, Tiffany doesn't manage your signs, do they?

21 A. No.

22 Q. So the net result of your sign maintenance management
23 failure, if that's the parlance you use, is that you had signs
24 in your stores where "Tiffany" standing alone was being used to
25 describe rings not made by Tiffany. Right?

G9LATIF6ps

Schutt - direct

1 A. (Pause)

2 Q. That's a yes or no --

3 A. Yes.

4 Q. -- I think that was a --

5 A. Yes.

6 Q. OK. And I assume you would have to agree with me that
7 Tiffany didn't go out searching for this problem; it was
8 reported -- you heard the testimony -- it was reported by a
9 Tiffany customer, as this was observed in the Huntington Beach
10 store. Right? You heard that?

11 A. Yes.

12 Q. And Tiffany sent an investigator to the store, and the
13 investigator confirmed that the signage reported was there.
14 Right?

15 A. Yes.

16 Q. So Costco's, I think you said sign maintenance management
17 issue, resulted in a Tiffany customer reporting this to Tiffany
18 and Tiffany confirming that its name was being used on signage
19 in a Costco store. You follow me so far, right?

20 A. I follow you.

21 Q. And my question to you was whether or not you think Tiffany
22 was right to be upset when it saw this signage. You say you
23 can't answer that yes.

24 A. Yes.

25 Q. OK. You can't say yes. OK.

G9LATIF6ps

Schutt - direct

1 So obviously, if you're taking the blame of some kind,
2 whatever that blame is -- and I'll get into it in a minute --
3 but if you're taking some blame for something, whatever you're
4 taking blame for, it has nothing to do with Tiffany, right?

5 A. No.

6 Q. It doesn't have anything to do with Tiffany. Right?

7 A. It does.

8 Q. Tiffany is responsible for your signs at Costco?

9 A. I'm here because of a lawsuit filed by Tiffany against our
10 company.

11 Q. That's why we're here, right.

12 A. Yes.

13 Q. Because Tiffany was upset. Right?

14 A. Yes.

15 Q. OK. And you're now coming to this court and telling this
16 jury, as a company, that it was your fault, we're responsible,
17 we take responsibility for what it is that precipitated what
18 happened here, because without the sign we wouldn't be here.
19 Right?

20 A. I take responsibility.

21 Q. OK. So it's not Tiffany's fault that Tiffany's name was
22 used in signs. It was Costco's fault. Right?

23 A. Yes.

24 Q. And you're sitting in front of this jury taking
25 responsibility for that. Yes?

G9LATIF6ps

Schutt - direct

1 A. Yes.

2 Q. So actually, until Mr. Dabney said that in his opening, to
3 the jury, and you now confirm it, isn't that the first time
4 Costco has ever communicated publicly that it is taking
5 responsibility for what precipitated this lawsuit?

6 A. We respect the ruling of the Court and acknowledge that.

7 Q. Well, let's go back. You're now saying -- by the way, when
8 did Costco take this responsibility that Mr. Dabney told the
9 jury? Was it right before trial?

10 A. I'm not clear on your question.

11 Q. I understood Mr. Dabney in his opening to be making a
12 statement to the jurors that Costco as a company is accepting
13 blame -- I didn't exactly say for what -- but they're accepting
14 blame. We changed the signs. We're not going to do it again.
15 Our bad. That's kind of what he said. Right?

16 A. Yes.

17 Q. OK. When did Costco accept that responsibility and take
18 that blame?

19 A. We accept the ruling of the Court.

20 Q. So when Judge Swain issued her decision on a summary
21 judgment motion, is that the first time Costco accepted
22 responsibility?

23 A. No.

24 Q. After that?

25 A. Well before that.

G9LATIF6ps

Schutt - direct

1 Q. Well before that. How far well -- how well before that?

2 A. Well, as, as -- when we were first notified by Tiffany that
3 we had the word "Tiffany," "Tiffany set," "Tiffany setting,"
4 "Tiffany style," within days we removed that from our signage
5 in our locations.

6 Q. So that's it. That's what taking responsibility means?
7 You took it off the signs?

8 A. That's part of it.

9 We also took responsibility, in my view, in how we
10 provided Tiffany with the information that they requested. I
11 think that's taking responsibility. We also subsequently,
12 after that, took responsibility in contacting our members to
13 let them know that if there is any chance of any
14 misunderstanding on this whole thing, that we wanted to make
15 sure that they -- we wanted to make it right, we wanted to make
16 sure they knew that they could return that ring for a full
17 refund. So we didn't want to take any advantage of any
18 misunderstanding out there with our valued members.

19 Q. How about responsibility to Tiffany and its customers?
20 What about that responsibility? I only hear about you're
21 talking about how to avoid liability, not responsibility.
22 Responsibility is saying, I did something wrong, I'm going to
23 take a public statement that we did something wrong, it's our
24 fault?

25 THE COURT: Is there a question?

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Schutt - direct

1 Q. Did Costco ever do that?

2 Did Costco ever issue a public apology to Tiffany?

3 A. No.

4 THE COURT: Mr. Mitchell, we have ten minutes till the
5 end of the day.

6 MR. MITCHELL: How many?

7 THE COURT: Ten.

8 MR. MITCHELL: Thank you.

9 Q. You were here when Ms. Abrams was on the stand, right?

10 A. Yes.

11 Q. And Mr. Dabney was questioning her about these letters that
12 went back and forth between me and your prior counsel?

13 A. Yes.

14 Q. So you just said to this jury that Costco took
15 responsibility as soon as it was notified by Tiffany, right
16 after. That's when you started taking responsibility. Right?

17 A. That's my view.

18 Q. The letter, there's a sentence in this letter, DTX 487, on
19 the second page, from your lawyer, on January 31, 2013 that
20 says, referring to Costco about the signage, "It did so not
21 because it believed it was obligated to do so" -- this is about
22 removing the signage. "It did so not because it believed it
23 was obligated to do so but because it did not want to get into
24 a fight over the issue." Does that read like taking
25 responsibility to you?

G9LATIF6ps

Schutt - direct

1 A. I, I know what, what the signs were intended to, to mean.
2 So we did not want to get in a fight over this. It really
3 wasn't worth it.

4 Q. Explain to me, Mister -- let me say it this way. When you
5 were the chief of merchandising at Costco, was there a
6 management team that met on a regular basis, that included the
7 CEO and most senior managers of the company?

8 A. I was part of our executive committee, which included all
9 the executive vice presidents in our company, our CEO, and a
10 few other individuals.

11 Q. And were you part of the management team that approved the
12 filing of a counterclaim against Tiffany seeking to have the
13 word "Tiffany" declared generic to describe a certain type of
14 ring? Were you part of the team that approved that?

15 MR. DABNEY: Your Honor, we have an objection.

16 THE COURT: Confer, please.

17 (Counsel confer)

18 THE COURT: Please stand closer together.

19 MR. MITCHELL: Your Honor, may I just go -- I don't
20 want to -- it would save time if I could read over Mr. Cole's
21 shoulder to ask a question.

22 THE COURT: All right. Shall we take -- OK. It's not
23 on the monitor.

24 MR. MITCHELL: Yes, it's not on -- just --

25 Q. I want to read you a paragraph from the counterclaim that

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Schutt - direct

1 Costco filed against Tiffany on March 8, 2013, paragraph 9.

2 "The word 'Tiffany' is a generic term for a ring setting
3 comprising multiple slender prongs extending upward from a base
4 to hold a single gemstone exemplified by the type of setting
5 depicted on page 1 above and by settings depicted described,
6 and referred to in Exhibit 1 as 'Tiffany settings.'"

7 Were you aware that Costco was filing that
8 counterclaim before it was filed?

9 A. I didn't have any specific knowledge about a counterclaim.

10 Q. You know that Costco did file a counterclaim in this case
11 that made that claim?

12 A. I, I know of --

13 Q. It's a yes or no. Did you know or not?

14 A. That requires a yes-and-no answer.

15 Q. Yes, it does.

16 A. It's a yes-and-no answer. Sorry.

17 Q. Did you -- I read you what the claim said. I'll rephrase
18 the question. I just read you what the paragraph of the
19 pleading said. You know now, having been involved in the
20 suit -- I deposed you in this lawsuit -- you were aware of the
21 claims made in this case by Costco, right?

22 A. I do know that some sort of claim was made on a
23 countersuit. I'm not an attorney. I don't know, I just don't
24 know the specifics of that claim.

25 Q. So Costco in response to this lawsuit filed its own suit

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Schutt - direct

1 against Tiffany attacking the Tiffany trademark, in its
2 broadest sense. Right?

3 A. OK.

4 Q. All right. Is that taking responsibility?

5 A. Yes.

6 Q. That's taking responsibility for what you did, for your
7 management failure to manage your signs right?

8 A. Um, I -- no. It's, it's not taking responsibility for,
9 for, for managing the signs right. It is an action that,
10 although we respect the ruling of the Court, is that we felt it
11 was something that, that was, was right to do. I was -- I was
12 not attorney, wasn't part of the -- our law team, legal team's
13 conversations or anything like that. But that's why I think
14 it's a yes and a no answer.

15 Q. You're saying here, you're using the phrase, I don't want
16 to misquote you, but something like, you know, we accept the
17 ruling of the Court. That means the summary judgment decision
18 from Judge Swain. Is that what you're referring to?

19 A. Yes, sir.

20 Q. OK. And that summary judgment decision, you know,
21 dismissed your counterclaim. Correct?

22 A. Yes.

23 Q. You know that, right?

24 A. Yes.

25 Q. And the Tiffany trademark is not generic according to Judge

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Schutt - direct

1 Swain in her decision. You know that too, right?

2 A. Yes.

3 Q. So prior to that ruling, before your counterclaim to
4 invalidate the Tiffany trademark in some fashion had been
5 denied, can you tell me anything you did, anything, other than
6 providing the sales information in that January 31st letter
7 that has three paragraphs, that would constitute taking
8 responsibility for your management failure to Tiffany?

9 A. We immediately took the "Tiffany" word off of any and all
10 signs in our jewelry case, very, very quickly, as soon as we
11 were notified by Tiffany. And we had, we had no legal
12 obligation to do that. But we just did. And we, we took full
13 responsibility for, for that sign maintenance management issue.
14 We, we made full disclosure of, the best of my knowledge, in
15 all these documents and these letters going back and forth and
16 these attorneys, and we tried to do what was right after that.

17 Q. So finally, the counterclaim is part of, to the value of
18 the Tiffany mark, is part of doing what was right. Is that it?

19 A. I'm not an attorney. I don't understand counterclaims. We
20 respect Judge Swain's ruling.

21 THE COURT: One minute, Mr. Mitchell.

22 MR. MITCHELL: How many?

23 THE COURT: One.

24 Q. Back going back to, let me ask you this question. Did you
25 know that after Judge Swain's decision was entered, that Costco

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1 filed an appeal with the Second Circuit claiming a First
2 Amendment right to use the word "Tiffany" in its stores?

3 A. I'm not aware of any specifics related to that.

4 Q. So you didn't know that Costco filed papers with the Second
5 Circuit Court of Appeals trying to avoid this trial and get an
6 immediate appeal, claiming a First Amendment right to continue
7 to use "Tiffany" in its signs? You didn't know that?

8 A. I have no personal knowledge of that.

9 MR. MITCHELL: Your Honor, I can stop there.

10 THE COURT: Thank you.

11 Ladies and gentlemen, thank you for your work with us
12 today. This concludes today's presentation of evidence.
13 Please be ready in the jury room tomorrow morning for 9:15. As
14 I indicated before, it will be a short day. We'll finish at 2
15 tomorrow. We'll take a half-hour lunch break, probably around
16 12:30.

17 And remember, you must not discuss the case or
18 anything or anyone having anything to do with it among
19 yourselves or with any other person, directly, electronically,
20 or by any other means. Leave your notes in the jury room in
21 the envelopes provided. And please be back in time to start at
22 9:15 tomorrow morning.

23 Thank you for your work. Safe home, safe return.

24 (The jury left the courtroom)

25 THE COURT: You may step down, Mr. Schutt.

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1 THE WITNESS: OK.

2 (Witness excused)

3 THE COURT: Counsel and parties will resume tomorrow
4 morning at 9. And I just want to make sure I don't have any of
5 my papers mixed up in these papers up on the board, but I'll
6 give them back after that.

7 MR. MITCHELL: May we have the standard direction with
8 Mr. Schutt that he is in the box, so to speak? He is in the
9 cross examination.

10 THE COURT: He's not on cross.

11 MR. MITCHELL: But he's under examination by an
12 adverse party. I mean, it really is...

13 THE COURT: Are you, Mr. Dabney, willing to agree to
14 that protocol, for this, while he's on direct?

15 MR. DABNEY: Yes, your Honor.

16 THE COURT: All right. So, Mr. Schutt, you are not to
17 discuss your testimony or the subject thereof with anyone.

18 THE WITNESS: Yes, your Honor.

19 THE COURT: Thank you very much.

20 MR. MITCHELL: I guess the question is, we may get to
21 depositions tomorrow.

22 THE COURT: Yes.

23 MR. MITCHELL: And obviously your Honor has ruled on
24 designations. There may be a couple of -- we don't really have
25 any. We may have none. So that's not the issue. But within

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1 the text of some of the questions are form objections at
2 deposition. How are we going to handle those, as they come
3 through the reading?

4 THE COURT: Objections that are not being pressed
5 should not be read. It should be questions and the answers. I
6 haven't memorized the transcript. Sometimes in order to
7 explain the way the testimony is laid out, the person reading
8 the questions may just have to say, there was an objection, and
9 then the question went on, and then the person gives the
10 answer. But colloquy between counsel should not be read out
11 and it should be redacted from any hard copy prepared of the
12 transcript for distribution to the jury.

13 MR. MITCHELL: OK.

14 And one final thing. As we go through the transcript
15 and we get to the admission of exhibits, how would you like to
16 handle those?

17 THE COURT: It would be helpful and efficient if
18 counsel could simply stipulate that Exhibit Z referred to in
19 the deposition is Defendant Exhibit 123 or Plaintiff's
20 Exhibit 4, and then offer whatever the exhibit number is that
21 we're using for this trial and explain that stipulation on the
22 record.

23 MR. MITCHELL: OK, your Honor.

24 THE COURT: Is that acceptable, Mr. Dabney?

25 MR. DABNEY: Yes, your Honor.

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1 THE COURT: Thank you.

2 MR. MITCHELL: Thank you.

3 THE COURT: All right. Thank you all. Safe home and
4 safe return. And I'll just have a quick look to make sure that
5 are not extraneous papers here.

6 Thank you all. They're ready for pickup. See you in
7 the morning.

8 I'm sorry. I would like to give back my copy of
9 Defendant's Exhibit 52 as well.

10 (Adjourned to 9:00 a.m., September 22, 2016)

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